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Supreme Court of the United States

October Term, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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No. _____

ERIE LACKAWANNA RAILWAY COMPANY,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, The Erie Lackawanna Railway Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment rendered, by a divided Court, in Case No. 75-2065, entitled *L. F. Cole, Plaintiff-Appellee v. Erie Lackawanna Railway Company, Defendant-Appellant,* and the order of that Court denying Petitioner's Petition for Rehearing.

That Court erred in refusing to hold that actual notice, timely received, is due notice.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Cole v. Erie Lackawanna Ry. Co.,* 541 F.2d 528 (6th Cir., 1976) and is reprinted in the Appendix attached hereto, *infra,* p. A2.

The first opinion of the District Court is unreported but is printed in the Appendix, *infra*, p. A29. The second opinion of the District Court, is reported as *Cole v. Erie Lackawanna Railway*, 396 F. Supp. 65 (N.D. Ohio, 1975) and is reprinted in the Appendix, *infra*, p. A21.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1976. On September 2, 1976, a Petition for Rehearing and Suggestion for Rehearing in Banc was filed by Petitioner. Said Petition for Rehearing was denied by Order filed on October 4, 1976. A copy of said Order is printed in the Appendix, *infra*, p. A1. This petition is, therefore, timely.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19 of this Court.

QUESTION PRESENTED

Where the Supreme Court of the United States has established certain standards for compliance with the notice provision of Section 3 First (j) of the Railway Labor Act, may the United States Court of Appeals for the Sixth Circuit disregard those standards, as promulgated by this Court and as interpreted by other Circuit Courts of Appeals, and hold that an employee who has authorized his union to represent him before a special board of adjustment may stand by with knowledge and notice of what is going on, allow matters to be thrashed out to a conclusion before the board, and, after a decision adverse to him has been rendered by the board, come in for the first time to assert his individual rights?

STATUTORY PROVISIONS INVOLVED

The notice provision of Section 3 First (j) of the Railway Labor Act (45 U.S.C. 153 First (j)) calls for only "due notice" and reads as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3 Second of the Railway Labor Act (45 U.S.C. Section 153 Second) provides for the constitution of the adjustment board as follows:

> "If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employee. If such carrier or such representative fails to agree upon the establishment of such

a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such

neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such award shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

The provisions applicable to proceedings for District Court enforcement of awards of the Adjustment Board are set forth in subparagraph (p) of Section 3 First of the Railway Labor Act (45 U.S.C. 153 First (p)), as follows:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on

the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

STATEMENT OF THE CASE

A. Statement of Facts

On April 7, 1971, Respondent was discharged by Petitioner for violation of railroad rules with respect to providing flag protection for property. Respondent's labor union represented him in the investigation of the charges which resulted in his dismissal, and in the ongoing grievance procedure, which included presentation of the claim to the Petitioner's Superintendent at Marion, Ohio.

Throughout the various stages of the grievance procedure, the claim was denied.

Thereafter, Respondent's claim was scheduled to be heard by a special board of adjustment established by labor and management pursuant to the provisions of Section 3 Second of the Railway Labor Act (45 U.S.C. Section 153 Second).

It is undisputed that Respondent knew of the pendency of the proceedings before the special board of adjustment and, according to his own testimony, he actually knew of the hearing date "probably a week before" it occurred, having been informed of it by the local chairman of his union. Respondent expected his union to prosecute his claim and grievance, and it was undisputed that his union representative had notice of the hearing and represented Respondent at that hearing. Admittedly, he did not ask his union not to proceed with the matter. Respondent was also familiar with the union constitution and knew that the union was authorized to represent him unless he advised it to the contrary.

On June 1, 1972, the special board of adjustment denied Respondent's claim.

On April 20, 1973, Respondent filed an "amended petition" in the United States District Court for the Northern District of Ohio, Western Division, wherein he requested the Court to review the award of the special board of adjustment and to set it aside for, among other reasons, failure of the board to give him notice of the hearing.

The petition averred that the District Court's jurisdiction was conferred by 45 U.S.C. Section 153 First (p) and (q).

On October 2, 1973, Respondent filed a motion for summary judgment in support of which he submitted an affidavit that he had never received "due notice" of the board's hearing.

On November 12, 1973, Petitioner filed a cross-motion for summary judgment in which it claimed that the District Court did not have subject matter jurisdiction over the claims presented in Respondent's "amended petition".

On February 6, 1974, the District Court rendered its decision, printed in the Appendix, *infra*, p. A29. The Court set aside the board's decision of June 1, 1972, and remanded the matter to the board for reconsideration on the ground that the board failed to comply with the requirements of 45 U.S.C. Section 153 First (j) in that Respondent was not sent, and did not receive, any notice that his petition was being considered by the board.

Pursuant to the Court's order of remand, the board reconsidered the matter on October 28, 1974. The board modified its earlier decision and set aside the discharge of Respondent, converting it into a disciplinary layoff of 365 days. It also ordered the railroad to comply with the award within thirty days.

Thirty days having elapsed, the Respondent, on December 4, 1974, filed in the District Court a supplemental petition seeking compliance with the board's order of October 28, 1974.

Petitioner opposed compliance and again requested the Court to correct its interlocutory order of February 6, 1974, wherein the Court had granted Respondent's motion for summary judgment on account of the board's alleged failure to comply with the statutory notice provisions.

On May 5, 1975, the Court issued its opinion, order and judgment, in *Cole* v. *Erie Lackawanna Railway*, 396 F. Supp. 65 (1975), reprinted in the Appendix, *infra*, p. A21. The Court ordered Petitioner to comply with the board's award of October 28, 1974.

On June 3, 1975, Petitioner filed in the District Court its notice of appeal from the order and judgment entered on May 5, 1975, and the order entered on February 6, 1974, remanding the matter to the board for reconsideration and denying the Petitioner's cross-motion for summary judgment.

On August 19, 1976, the Court of Appeals for the Sixth Circuit, by a divided Court, affirmed the judgment of the District Court, and, on October 4, 1976, denied Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc.

Petitioner now seeks review of the Court of Appeals' decision of August 19, 1976 and of its order of October 4, 1976, denying the Petition for Rehearing.

B. Decisions of the District Court

The District Court's decision of February 6, 1974, printed herein in the Appendix, *infra*, p. A29, was grounded upon the failure of the special board of adjustment to give formal statutory notice of the hearing to Respondent. As the Court stated:

> "It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner [Mr. Cole] was not sent, and did not receive, any notice that his petition was being considered by the Board. Having been deprived of due notice, he was

surely deprived of the right to appear either in person or through counsel as the statute permits." (App. pp. A35-A36; footnote omitted).

Thus, in its first decision, the District Court did not discuss the issue of whether Respondent may have had "actual notice" of the hearing sufficient to fulfill the requirements of Subsection (j) despite the board's failure to give formal notice of the hearing.

In its second opinion printed herein at p. A21, the District Court briefly discussed the question of "actual notice." Citing *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951), the Court defined the kind of notice or knowledge required by Section 3 First (j) to be "[a]ctual notice of the hearings for a sufficient period prior thereto to permit [plaintiff] to be present and to be heard * * *." (App. p. A24).

Petitioner submits that Respondent uncontrovertibly knew of the scheduled hearing for a sufficient period prior thereto (by his own admission, "probably a week before,") to permit him to be present and to be heard.

Yet, the District Court, without indicating what its doubts were, found there to be "compelling doubts that he had any such knowledge in sufficient time to permit him to retain counsel, gather his witnesses and be present at the Board's hearing so as to be heard." (App. p. A24). The District Court then goes on to hold that "all doubts would have been removed if the Board itself had simply served formal notice on the plaintiff of the pendency of its proceedings." (App. p. A24).

After discussing Respondent's union representation, the District Court ordered enforcement of and compliance with the board's award of October 28, 1974.

C. Decision of the Court of Appeals

The opinion of the Court of Appeals was delivered by Circuit Judge Celebrezze and was joined in by Circuit Judge Peck. Circuit Judge Engel filed a separate dissenting opinion. The majority first holds that the District Court did have jurisdiction to review the board's determination. It then holds that the District Court did not err in applying the notice requirements of 45 U.S.C. Section 153 First (j) to a special adjustment board proceeding. Finally, the majority discusses the issue of whether Respondent had in fact received sufficient notice of the June 1972 hearing before the board to satisfy the notice provision.

In regard to this question of "actual notice", the majority correctly holds that "the Board's failure to furnish formal notice to Appellee does not in this instance resolve the notice question." (App. p. A13). The majority stated that, "We agree with a line of Seventh Circuit decisions which have expanded on *Burley I* and *Burley II* [*Elgin, J. & E. Ry. Co. v. Burley* (*Burley I*), 325 U.S. 711 (1945); *Elgin, J. & E. Ry. Co. v. Burley* (*Burley II*), 327 U.S. 661 (1946)] to hold that in situations where employee-grievants have authorized their union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings." (App. p. A13).

The majority then, however, citing no authority, goes on to define "actual notice" as:

> ". . . notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14).

The Court then finds that "Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, . . ." (App. p. A14). And, after reviewing portions of Respondent's testimony, the majority finds that "Appellee's statements indicate that he knew in advance that the Board would be conducting a hearing on his claim." (App. p. A16).

The Court then went on:

> "However, Appellee's statements also vividly demonstrate that he did not understand the workings of the Board. His reference to the Board as the 'Labor Relations Board' and his requests to be present and present witnesses are further indicia of his lack of understanding. Appellant has not attempted to refute Appellee's statements concerning the union officials telling him that he could not attend the hearing on his claim and that his witnesses would not be needed. Thus the only inference which may be drawn from the record is that Appellee was not allowed to convey information which might have been helpful in presenting his claim. *The union cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section 153 First (j), has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials.* Appellee did not receive notice sufficient to obviate the provision to him of formal notice as required by Section 153 First (j)." (App. p. A16; Emphasis added).

Petitioner contends that the United States Court of Appeals for the Sixth Circuit erred in that:

(1) Its definition of "actual notice" is in conflict with previous decisions of this Court;

(2) Its holding that individual notice is required even though the employee authorized his union to prosecute his claim is in conflict with previous decisions of this Court;

(3) Its definition of "actual notice" is in conflict with the standard applied by other Courts of Appeals;

(4) Even applying the Court of Appeals' standard, the Court erred in finding that Respondent did not receive "actual notice" in the instant case.

In his dissenting opinion, Circuit Judge Engel first stated his agreement with the majority that the District Court had jurisdiction to exercise a limited judicial review over the board's determination and that the notice provisions of Section 153 First (j) apply to proceedings before special adjustment boards. He dissented, however, from the majority holding that Respondent did not receive notice sufficient to satisfy Section 153 First (j), "especially in view of the majority's clearly supported finding that the appellee authorized the U.T.U. to handle his grievance, both personally and by virtue of the authorization contained in Article 44 of the U.T.U. Constitution." (App. p. A17).

Noting that Respondent had himself acknowledged that he knew in advance that the board would be conducting a hearing on his claim and that he expected the union to represent him personally (App. p. A17), Judge Engel stated:

> "Apparently, the majority opinion holds what the Supreme Court in *Burley II* expressly ruled it would not hold:

'. . . that any employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the board on their submission, allow matters to be threshed (sic) out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.' *Burley II, supra,* at 666." (App. pp. A17-A18).

After finding the dictates of *Burley* to have been satisfied both by the authority granted the union by Respondent and by the actual knowledge possessed by Respondent (App. pp. A18-A19), and after discussing the line of Seventh Circuit decisions, Judge Engel discussed the result of the majority's decision:

"The effect of the majority opinion, as I see it, is to give the employee and the union a second bite of the apple merely by their mutual agreement that union representation was inadequate, a confession easy to make when the union suffers no penalty and difficult, if not impossible, to refute by the Board or the carrier since neither has been privy to the incident." (App. pp. A19-A20).

Judge Engel found the better course to be to leave the employee to his remedy against the union for breach of its duty of fair representation (App. p. A20), and accurately stated that "The difficulty is not in the notice; it is in the advice which the union gave Cole after the notice." (App. p. A20). The union is not, and never has been, a party to the instant litigation.

ARGUMENT

A. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision Concerning an Important Issue of Federal Law and National Labor Policy, Which Decision Is in Conflict With Prior Decisions of This Court and With Prior Decisions of the United States Court of Appeals for the Seventh Circuit.

The decision rendered herein by the United States Court of Appeals for the Sixth Circuit is in conflict with prior decisions of this Court and with prior decisions of the Court of Appeals for the Seventh Circuit in the following aspects:

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provisions of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley II*), 327 U.S. 661 (1946).

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly was authorized to represent him, is contrary to this Court's construction of the statute as stated in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley I*), 325 U.S. 711 (1945), and *Czosek v. O'Mara,* 397 U.S. 25 (1970).

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including *Kotakis v.*

Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975), and *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951).

Each of these conflicts will be discussed in the following sections.

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provision of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in Burley II, supra.

After recognizing that, in situations where employee-grievants have authorized their union to handle their grievances, NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings, the majority arbitrarily defines "actual notice" as follows:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14).

This arbitrary definition, for which the Court of Appeals cites no authority, is much more cumbersome than the notice requirements discussed by this Court in *Burley II, supra*.

After noting that it had not undertaken to define "due notice" in *Burley I, supra,* and was not undertaking to do so in *Burley II*, this court nevertheless discussed the elements of notice at page 666 of the *Burley II* opinion, footnote 9:

> ". . . 'Due notice' conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency."

Unquestionably, Respondent had "knowledge . . . of the pendency of the proceedings . . ." In fact the Court of Appeals found that "Appellee's statements indicated that he knew in advance that the Board would be conducting a hearing on his claim." (App. p. A16). Respondent's uncontroverted testimony provides ample evidence of his knowledge of the pendency of the hearing:

> "Q. Well, specifically, you knew there was going to be a Board hearing; is that right?
>
> A. Oh yes, because I was up to Murphey's [Local Chairman] office before the Board hearing, a few days before the Board hearing and I was told there was going to be the Board hearing.
>
> Q. And that was to be held in Cleveland?
>
> A. Yes, with three members.
>
> Q. So you knew that two or three days before?
>
> A. Yes.
>
> Q. From what Murphey had told you?
>
> A. Yes.
>
> Q. That there was going to be a Board hearing?
>
> A. Yes—I would say it was probably a week before." (Respondent's deposition, page 25).

As is readily apparent from his own testimony, Respondent not only had "knowledge . . . of the pendency of

the proceedings . . ." he knew, "probably a week before," that the hearing was to occur, where it was to occur, and how many members of the board would hear his claim. Yet, the Court of Appeals finds that Respondent did not have actual notice, apparently because "he did not understand the workings of the Board." (App. p. A16).

In *Burley II, supra*, this Court states at pages 666-667:

> ". . . Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights. No such ruling was necessary for their preservation and none was intended."

In the instant case, the Court of Appeals for the Sixth Circuit has condoned exactly those actions which this Court has stated that it would not condone; i.e. after having found that Respondent relied upon and authorized his union to handle his claim before the special adjustment board (App. pp. A14-A15), and after having found that Respondent knew in advance that the board would be conducting a hearing on his claim (App. p. A16), the majority nevertheless has allowed Respondent to stand by with

knowledge of what was going on with reference to his claim, to allow matters to be thrashed out to a conclusion, and then to come in for the first time to assert his individual rights, all because the majority felt Respondent did not understand the workings of the Board, and because his union (not a party to this litigation, but concededly authorized to represent him before the Board), allegedly gave him bad advice.

Because the majority's holding conflicts with this Court's holding in *Burley II, supra,* the petition for certiorari should be granted and the judgment of the Court of Appeals reversed.

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly is representing him, is contrary to this Court's construction of the statute as stated in Elgin, J. & E. Ry. Co. v. Burley (Burley I), 325 U.S. 711 (1945), and Czosek v. O'Mara, 397 U.S. 25 (1970).

The majority clearly holds that Respondent authorized the union to prosecute his individual claim:

> "A review of the record demonstrates that Appellee authorized the UTU to handle his grievance. The union represented Appellee in dealing with the carrier. When these efforts met with no success Appellee authorized the union to attempt to secure relief for Appellee from a special adjustment board. Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, but any existing doubt must be resolved in favor of authorization in light of Article 44 of the UTU Constitution which grants the

union 'complete authority' to represent members before any 'board or other tribunal.'" (App. pp. A14-A15; footnote omitted).

Despite this clear finding of union authorization to process the claim, the majority nevertheless holds that Respondent was entitled to individual notice of the board hearing. This holding is contrary to prior decisions of this Court.

In discussing the provisions of the Railway Labor Act in *Burley I, supra,* this Court said of the employee's rights thereunder:

> "They are statutory rights, which he may exercise independently *or* authorize the union to exercise in his behalf." *Burley I, supra,* 740, n.39. (Emphasis added).

This view was reaffirmed by the Court specifically with reference to the provisions of Section 3 First (j) of the Act in *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n.1 (1970). Having chosen to authorize the union to exercise his statutory rights on his behalf, Respondent waived the option to exercise those rights independently, including the right to individual notice under Section 3 First (j).

And, as Judge Engel aptly noted in his dissenting opinion:

> "The question of actual notice is important only insofar as it infers authority by estoppel. 'Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption.' *Burley II, supra,* at 665 n.7." (App. p. A18).

See also, *Pyzynski v. New York Cent. Rd. Co.,* 421 F.2d 854, 859-860 (2d Cir. 1970)

Thus, the majority's holding that individual notice is required by Section 3 First (j) of the Act when the union has clearly been authorized to process the claim on the employee's behalf is contrary to this Court's holdings in *Burley I, supra,* and *Czosek* v. *O'Mara, supra.* This petition for certiorari should therefore be allowed.

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including Kotakis v. Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975) and Hunter v. Atchison, T. & S. F. Ry. Co., 188 F.2d 294 (7th Cir. 1951).

In the 1975 case of *Kotakis v. Elgin, J. & E. Ry. Co., supra,* a former railroad employee sought review of an award of the National Railroad Adjustment Board and alleged conspiracy between the union and the railroad to deprive him of his right to proper representation by the union. Among his contentions was failure of the Board to provide him with due notice as required by Section 3 First (j). The Seventh Circuit dealt rather summarily with this contention at page 576 of its opinion:

> "As to plaintiff's contention that the Adjustment Board award was a nullity for failure to provide him written notice of the Board's hearings under Section 3 First (j) of the Act (45 U.S.C. §153 First (j)), since Count I of the complaint does not attack the failure of the Board to give such notice and no such argument was made in the district court, it is not properly before use. *Moreover, the record discloses*

that plaintiff knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there. That satisfies the notice requirement. Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U.S. 661, 666-667, 66 S. Ct. 721, 90 L. Ed. 928." (footnote omitted; emphasis added).

Under the *Kotakis* ruling, Respondent, having been found by the majority to have had knowledge of the hearing and to have authorized the union to represent him there, would unquestionably have been found to have had notice sufficient to satisfy the notice requirement of Section 153 First (j).

And, in *Hunter v. Atchison, T. & S. F. Ry. Co., supra,* the Seventh Circuit first reviewed the applicable case law at pages 299 to 301 of its opinion, reaffirming the view that formal notice is not an essential condition precedent and that "actual notice" may satisfy the statutory notice requirements. At page 301, the Court defined "actual notice" as follows:

"Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity, and any plaintiff who had actual notice of the hearings, *or* authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him." (Emphasis added).

In the instant case, Respondent knew of the date of the hearing, "probably a week before," surely "a sufficient period prior thereto to permit [plaintiff] to be present and to be heard. . ." The fact that he was not present and was not heard individually (apparently because his local chairman told him it was unnecessary) has no bearing upon the sufficiency of the notice.

Furthermore, the Seventh Circuit recognized that, in any event, no individual notice was required if the employee had authorized another to represent him at the hearing and if the authorized party received due notice. Since the Sixth Circuit clearly found that Respondent herein had authorized the union to represent him, its decision is also in conflict with the Seventh Circuit insofar as it requires both employee authorization to the union to prosecute his individual claim *and* formal or actual notice to the individual.

The Court should grant this petition for certiorari in order to resolve the conflict between the decisions of the Sixth and Seventh Circuits.

B. Even Assuming the Court of Appeals' Definition of "Actual Notice" to Be a Correct One, the Court Erred in Holding That Respondent Had Not Received Such "Actual Notice".

It should first be noted that the majority holds Respondent not to have received "actual notice" even under circumstances in which the majority admits that: (1) the employee authorized his union to represent him in presenting his grievance to the railroad (App. p. A14); (2) the employee authorized and relied upon his union to attempt to secure relief from, and handle his claim before, a special adjustment board (App. p. A14); (3) the union's constitution grants the union "complete authority" to represent the employee before any "board" (App. pp. A14-A15); (4) both the union and the employee knew in advance when the hearing before the board was scheduled (App. p. A16); (5) it was undisputed that the union representative did in fact attend the hearing and present the employee's claim to the board.

Yet, in the face of all these findings, the majority holds that Respondent did not receive "actual notice", having defined "actual notice" as "notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." Even assuming, *arguendo*, that the majority is correct in its definition, the fact is that Respondent did in fact receive such "actual notice", "probably a week before" the hearing occurred. Certainly one week's time is sufficient to allow Respondent to consult with and relay information to union officials. In fact, he received the notice from a union official and, accordingly, was consulting with a union official (his Local Chairman, Murphey) at the very time he received the notice!

Thus, it is clear from the record that the majority did not affirm the lower Court's decision because the Respondent did not receive "actual notice", but rather because the *union* allegedly did not afford him the opportunity to present possibly relevant information to its own officials. The carrier, and the carrier alone, is being chastised for the sins of the union, when the carrier had no way of knowing what advice union officials had given to the employee, and, in any event, had no control over what advice the union gave its members.

The burden which the majority's opinion places upon the carrier is an impossible one. The carrier must now ascertain that the board has given notice of the hearing to the employee. It must then ascertain that that notice was given sufficiently in advance of the hearing to enable the employee to consult with union officials and to relay whatever information he may have to them. And finally

it must ascertain that the union has afforded him the opportunity for such consultation, has correctly informed him of the nature of the proceedings, and has accurately explained his rights to him. If it does not do all of these things, the carrier may well find itself in the position of this Petitioner, where, having relied upon the authority of the union to represent the grievant, and, having pursued the course of action prescribed by Section 153 Second, it is suddenly faced with a disgruntled employee who claims not to have been told *by the union* the nature of the proceedings before the special board of adjustment, and by a union which confesses guilt, "a confession easy to make when the union suffers no penalty and difficult, if not impossible, to refute by the Board or the carrier since neither has been privy to the incident." (J. Engel's dissent, App. pp. A19-A20).

The practical effect of the majority's opinion is a simple one: an employer may no longer assume that the union is doing its job. It must become a watchdog, closely scrutinizing the actions of union officials to be certain that they are properly representing their members (a prospect which we cannot believe a union would look favorably upon). But how is the carrier to control those union officials when it discovers that they have not satisfactorily performed their obligations to their members? What should the employer do? The majority does not deal with these questions.

The employee's remedy, if he has in fact been wronged, is not against the carrier, but against the union. In the instant case, the Court of Appeals for the Sixth Circuit has so far departed from the established federal law as to call for an exercise of this Court's power of supervision.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC

(Filed October 4, 1976)

No. 75-2065

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. F. COLE,
Plaintiff-Appellee,
v.
ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellant.

ORDER

Before: CELEBREZZE, PECK and ENGEL, *Circuit Judges.*

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No judge of this Court having moved for a rehearing in banc, the petition to rehear has been referred to the panel which heard the original appeal.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

OPINION OF THE COURT OF APPEALS

(Filed August 19, 1976)

No. 75-2065

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

L. F. COLE,
Plaintiff-Appellee,

v.

ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Before: CELEBREZZE, PECK and ENGEL, *Circuit Judges.*

CELEBREZZE, *Circuit Judge,* delivered the opinion of the Court, in which PECK, *Circuit Judge,* joined. ENGEL, *Circuit Judge* (pp. 15-18), filed a separate dissenting opinion.

CELEBREZZE, *Circuit Judge.* L. F. Cole (hereinafter Appellee) was discharged in 1971 by the Erie Lackawanna Railway Company (hereinafter Appellant) for alleged unsatisfactory job performance. Following unsuccessful grievance efforts, Appellee, pursuant to 45 U.S.C. § 153

Second[1] of the Railway Labor Act, sought relief from a special board of adjustment. Section 153 is a lengthy statute, spanning some eight pages. The bulk of the section is devoted to establishing the National Railroad Adjustment Board (hereinafter the NRAB) and setting out its powers and duties. Section 153 Second, added by amendment in 1966, empowers carriers and their employees to set up local special adjustment boards to resolve claims which

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1. Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board, for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in any agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so

(Footnote continued on following page)

would otherwise be filed with the NRAB or which have remained on the NRAB docket for over a year.

In 1926 Congress first authorized carriers and their employees to establish boards of adjustment to resolve minor disputes.[2] However, the 1962 Act was fraught with problems in that no sanctions for failure to reach agreement were provided and failure to agree was commonplace as

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(Continued from previous page)

designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

2. The history of the arbitration provisions of the Railway Labor Act has been thoroughly reviewed in a recent Fourth Circuit opinion, *Employees Protective Association v. Norfolk & W. Ry.*, 511 F.2d 1040, 1043-44 (4th Cir. 1975), and in a number of Supreme Court opinions cited therein: *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957); *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972).

these early boards of adjustment were composed of equal members of employee and carrier representatives.

In 1934 Congress established the NRAB to provide a nationwide arbitration mechanism for resolving minor disputes between individual employees and carriers. The NRAB is divided into four divisions, each division hears claims from employees in particular job classifications. The NRAB sits in panels of three, one carrier-designated member, one member designated by employee representatives and one neutral panelist designated by the National Mediation Board.

The 1934 Act also carried forward authority to establish carrier, group or regional boards similar to those authorized in the 1926 Act. The above-noted problems with the early carrier-employee adjustment boards continued and such boards were seldom established. The result was the development of a backlog of thousands of claims awaiting disposition by the NRAB. In 1966, in response to this backlog, Congress amended the Railway Labor Act by adding Section 153 Second altering the structure of special adjustment boards to include a neutral panelist and authorizing such boards to hear claims otherwise referable to the NRAB.

Section 153 Second authorizes a carrier or group of carriers and representatives of the employees of such carrier or carriers to agree to the formation of a special adjustment board. If a carrier or union requests the formation of such a board and the nonrequesting party does not agree to the formation of a board within thirty days of the date of the request, the National Mediation Board is empowered to name a representative for the nonagreeing party. If the carrier and union representatives are unable to agree on the proper disposition of a claim, the

National Mediation Board is also empowered to appoint a neutral member to break the deadlock.

In 1971 Appellant and the United Transportation Union (hereinafter UTU), pursuant to an agreement, established a special adjustment board, Public Law Board No. 855 (hereinafter the Board), to resolve seven specified employee claims. Appellee's claim was one of the seven submitted to the Board.

In June of 1972, the Board, following its initial consideration of Appellee's claim, concluded that he had been dismissed for just cause and denied the claim. In April of 1973 Appellee filed an amended petition in district court seeking review of the Board's determination. In February of 1974 the district court granted Appellee's motion for summary judgment. The district court concluded that the Board had failed to provide Appellee with notice of its proceedings as required by 45 U.S.C. § 153 First (j).[3] The district court remanded the action to the Board. In October of 1974 the Board reconsidered its original determination and set aside Appellee's discharge, converting it into a 365-day disciplinary layoff, and ordered reinstatement and back pay for that portion of the layoff period in excess of 365 days. In December of 1974 Appellee petitioned the district court for enforcement of the Board's October determination. In May of 1975 the district court sustained Appellee's second motion for summary judgment and ordered Appellant to comply with the Board's determination.[4] Appellant brings this appeal from the district court's enforcement order.

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3. (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

4. *L. F. Cole v. Erie Lackawanna Ry.*, 396 F. Supp. 65 (N.D. Ohio 1975).

Appellant raises three issues in challenging the district court's order. Appellant contends that the district court lacked jurisdiction to review the Board's determination. Appellant next argues that the district court erred in applying the notice requirements of 45 U.S.C. Section 153 First (j) to a special adjustment board proceeding. Finally, Appellant argues that even if Section 153 First (j) applies to special adjustment board proceedings, Appellee received sufficient actual notice of the June 1972 hearing before the Board to satisfy the notice provision.

Appellant first contends that Section 153 First (q),[5] which makes district court review available to a party aggrieved by the failure of the NRAB to make an award or by the terms of an award, does not apply to determinations of special adjustment boards. Appellant notes that Section 153 Second which empowers the establishment of special adjustment boards, does not expressly incorporate Section 153 First (q). Appellant further notes that Section 153 Second and Section 153 First (q) were added

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5. (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

by 1966 amendments to the Railway Labor Act contained in a single piece of legislation. Appellant thus concludes that if Congress had intended to make Section 153 First (q) applicable to special adjustment board proceedings it would have so stated in the text of the statute. Appellant cites no judicial authority for this proposition. Appellant also makes no attempt to analyze the legislative history of the 1966 amendments. Appellant's only analysis of this issue, other than the statutory construction argument, is contained in a short paragraph at page 14 of its brief to the Court:

> The proceedings by way oof [sic] the Special Law Boards were designed to provide labor and management an expeditious way of handling minor disputes without going to the National Railroad Adjustment Board. There was no reason why the Special Law Board proceedings had to be handled in the same way that proceedings were handled in the National Railroad Adjustment Board.

Appellee responds by arguing that a review of the legislative history of the 1966 amendments demonstrates that Congress intended that parties to special adjustment board proceedings have the same access to limited district court review as would parties to NRAB proceedings. The purpose of the 1966 Amendments is set out in Senate Report No. 1201.[6] The Senate Report states that the purpose of the amendment was "to eliminate the large backlog [of cases pending before the NRAB] . . . and to provide equal opportunity for limited judicial review of awards of the [NRAB] to employees and employers."[7] The Report further states:

6. 1966 U.S. Code Cong. and Admin. News, pg. 2285 *et seq.*

7. *Id.* at 2285-2286.

> The bill also provides that judicial review of orders of the National Railroad Adjustment Board, *and of boards established under this legislation,* relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal. [Emphasis added.][8]

It is clear from the above legislative history that Congress intended the district courts to exercise limited judicial review over determinations of the NRAB and over determinations of special adjustment boards. We affirmed a district court conclusion to this effect in *Switchmen's Union v. Clinchfield R.R.*, 427 F.2d 161 (6th Cir.), *cert. denied*, 400 U.S. 824 (1970). *Accord, Transportation-Communication Division—Brotherhood of Ry. Workers v. St. Louis-San Francisco Ry.*, 419 F.2d 933, 935 (8th Cir. 1969); *Slagley v. Illinois Central R.R.*, 397 F.2d 546, 550-51 (7th Cir. 1968).

Appellant next argues that the notice requirements of Section 153 First (j) do not apply to special board proceedings and consequently the district court erred in overturning the June 1972 judgment of Public Law Board No. 855 for failure to afford Appellee notice which satisfied Section 153 First (j). Appellant's second argument is a remake of its first argument. Appellant contends that Section 153 First (j) does not apply in special board proceedings because it was not expressly incorporated in Section 153 Second. Again, Appellant cites no judicial

8. *Id.* at 2289.

authority for this contention. The district court concluded that Appellant's position on this issue "ignores the legislative history, as well as the plain language, of the statute."[9] One of the passages from the legislative history of the 1966 amendments which we quoted in discussing the first issue raised by Appellant supports the district court's conclusion on this issue:

> The bill also provides that judicial review of orders of the National Railroad Adjustment Board, and of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party but limited to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, *whether the statutory requirements were complied with,* and whether there was fraud or corruption on the part of a member of the tribunal. [Emphasis added.][10]

We concluded above that Section 153 Second incorporated Section 153 First (q) by implication, thereby allowing parties to special board proceedings to secure review in district court. The above quoted passage from the Senate Report on the 1966 amendments indicates that Congress also contemplated the incorporation of procedural requirements such as the notice provisions of Section 153 First (j). The Congressional purpose in authorizing the creation of special adjustment boards was to relieve the congested dockets of two of the four divisions of the NRAB. Congress was seeking to secure the speedy resolution of employee claims originally envisioned by the framers of

9. *L. F. Cole v. Erie Lackawanna Ry.*, No. C73-70 (N.D. Ohio Feb. 6, 1974), Appendix at 28.

10. 1966 U.S. Code Cong. and Admin. News, 2285, at 2289.

the 1934 Act which created the NRAB. Congress envisioned special adjustment boards as local extensions of the NRAB. It is clear that special adjustment boards have jurisdiction coextensive with that of the NRAB. Appellant has advanced no good reason why the statutory procedural rights afforded to employees whose claims are heard by special adjustment boards should be less than those enjoyed by employees whose claims are resolved by the NRAB. We therefore conclude that Section 153 First (j) applies to proceedings before special adjustment boards.

Finally, Appellant argues that the district court erred in concluding that Appellee did not receive notice sufficient to satisfy Section 153 First (j) prior to the Board's initial consideration of his claim. Appellant concedes that the Board did not furnish Appellee formal notice, but contends that Appellee had actual notice of the Board proceedings.

The seminal discussion of actual notice in this context is contained in *Elgin, J. & E. Ry. v. Burley,* 325 U.S. 711 (1945), (*Burley I*), and *Elgin, J. & E. Ry. v. Burley,* 327 U.S. 661 (1946), (*Burley II*). In *Burley I* the Supreme Court stated that an employee who has filed a claim with the NRAB has rights to

> "notice, hearing and individual representation according to his choice. All these rights are separate and distinct, though closely related. A surrender or delegation of one would not result in surrender of the others as a matter of law or necessarily as a matter of fact."[11]

In *Burley II* the Court noted that frequently an employee will authorize a collective agent to deal with the carrier

11. 325 U.S. at 746.

in resolving a grievance. The Court elaborated on its *Burley I* statement concerning notice:

> It is not likely that workingmen having grievances will be ignorant in many cases either of negotiations conducted between the collective agent and the carrier for their settlement or of the fact that the dispute has been submitted by one or the other to the Adjustment Board for determination. * * *
>
> In view of these facts there cannot be many instances in which an aggrieved employee will not have knowledge or notice that negotiations affecting his claim are being conducted, or, if they fail, that proceedings are pending before the Board to dispose of it.
>
> We pointed out in the former opinion that § 3 First (j) expressly provides that "the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them," 325 U.S. at pages 731, 734, 65 S.Ct. 1293, 1295, and this provision, with the emphasis we placed upon the phrase "to the employee" and the conjunction of the provision for "due notice" with the provision for representation "in person, by counsel, or by other representatives," was one of the statutory mainstays for our conclusion that the Act did not give the collective agent the exclusive powers over the settlement of grievances claimed for it.
>
> But we did not undertake to define what was meant by "due notice," nor do we now. "Due notice" conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the ag-

> grieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency.[12]

The Court then concluded:

> Although under our ruling his rights to have voice in the settlement are preserved, whether by conferring with the carrier and, having seasonably done so, refusing to be bound by a settlement reached over his protest, or by having representation before the Board according to his own choice, we did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights.

Appellant does not dispute th fact that the Board did not furnish Appellee formal notice of its proceedings on his claim. However, the Board's failure to furnish formal notice to Appellee does not in this instance resolve the notice question. We agree with a line of Seventh Circuit decisions which have expanded on *Burley I* and *Burley II* to hold that in situations where employee-grievants have authorized their union to handle their grievances NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings. *See, Kotakis v. Elgin, J. & E. Ry.*, 520 F.2d 570, 576 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975); *Illinois Central R.R. v. Whitehouse*, 212 F.2d 22, 29 (7th

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12. 327 U.S. at 665-666.

13. *Id.* at 666-667.

Cir. 1954) *rev'd on other grounds,* 349 U.S. 366 (1955); *Hunter v. Atchison, T. & S.F. Ry.,* 188 F.2d 294, 301 (7th Cir. 1951).

Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim.

A review of the record demonstrates that Appellee authorized the UTU to handle his grievance. The union represented Appellee in dealing with the carrier. When these efforts met with no success Appellee authorized the union to attempt to secure relief for Appellee from a special adjustment board. Appellee's actions leave little room for doubt about his reliance on the UTU to handle his claim before the special adjustment board, but any existing doubt must be resolved in favor of authorization in light of Article 44 of the UTU Constitution[14] which

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14. ARTICLE 44

AUTHORITY TO REPRESENT

Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints, or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in acordance with the provisions of this Constitution, except where the member involved serves reasonable written notice on the United Transportation Union to the contrary.

Decisions reached disposing of or settling claims, complaints, and grievances referred to herein shall be furnished in writing, within thirty (30) days after such decision, to the Local Chairman and Secretary of the local submitting such claims, complaints, and grievances.

grants the union "complete authority" to represent members before any "board or other tribunal."

Appellant contends that statements made by Appellee in a February 13, 1975, deposition amount to an admission of receipt of actual notice of the Board proceedings on his claim. Appellee's statements were in response to questions about his contact with UTU officials prior to the Board proceedings:

> Q. And you didn't do anything on your own to process it [the claim] yourself, I gather?
>
> A. No; I didn't. I asked them if there was anything I could do for them and they said no, they said there isn't anything we could do. I asked them if I could bring any witnesses or just come in there myself and they said there was no use.
>
> Q. Now, we are talking about a Board procedure hearing as contrasted to meeting with the management people?
>
> A. I don't quite understand that.
>
> Q. You say they told you that you couldn't do anything and I'm asking you was that with respect to a Board procedure when they were going to go before it or did that have to do when they were dealing directly with the Superintendent or whoever it was of management at a lower level?
>
> A. I asked them at the lower level. First we had the investigation; that came first and then I asked them when we went before the Board on the final one up there for the decision and they made the statement that they had four cases and mine was the best one of the four and that I didn't have to bring any witnesses in and I couldn't go in myself because it

was a closed door session is what they told me, what Murphey told me.

Q. But you knew there was going to be a hearing?

A. Oh, yes; I knew there was going to be a hearing.

Q. And they told you though that there wasn't any sense in going?

A. Right."[15]

Appellee's statements indicate that he knew in advance that the Board would be conducting a hearing on his claim. However, Appellee's statements also vividly demonstrate that he did not understand the workings of the Board. His reference to the Board as the "Labor Relations Board" and his requests to be present and present witnesses are further indicia of his lack of understanding. Appellant has not attempted to refute Appellee's statements concerning the union officials telling him that he could not attend the hearing on his claim and that his witnesses would not be needed. Thus the only inference which may be drawn from the record is that Appellee was not allowed to convey information which might have been helpful in presenting his claim. The union cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section 153 First (j), has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials. Appellee did not receive notice sufficient to obviate the provision to him of formal notice as required by Section 153 First (j). As the district court noted in concluding that the Board's original determination was improper:

15. Appellant's Appendix at 45-46.

> "Without a formal notice from the Board, plaintiff was foreclosed from making the very decision [to represent himself or to be represented by counsel or by union representatives] which § 9 First (j) empowers him to make; thus his failure to act affirmatively cannot be held to have been a waiver of his right."[16]

The judgment of the district court is affirmed.

ENGEL, *Circuit Judge*, dissenting. I agree with the majority that the district court had jurisdiction to exercise a limited judicial review over the determination of the special adjustment board. I further agree with the majority that the provisions of § 153 First (j) apply to proceedings before special adjustment boards under 45 U.S.C. § 153 Second. I am unable, however, to agree that the appellee did not receive notice sufficient to satisfy § 153 First (j), especially in view of the majority's clearly supported finding that the appellee authorized the U.T.U. to handle his grievance, both personally and by virtue of the authorization contained in Article 44 of the U.T.U. Constitution.

As appellee himself acknowledged, he knew in advance that the Board would be conducting a hearing on his claim and expected the union to represent him personally. Apparently, the majority opinion holds what the Supreme Court in *Burley II* expressly ruled it would not hold:

> ". . . that any employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the board on their submission, allow matters to be threshed out to a conclusion by one method or the other, and then come in for

16. *Cole* v. *Erie Lackawanna Ry.*, 396 F. Supp. 65, 69 (N.D. Ohio 1975).

the first time to assert his individual rights." *Burley II, supra,* at 666.

The majority appears to construe the holding in *Burley I* and *II* to require both employee authorization to the union to prosecute his individual claim *and* formal or actual notice. However, the Supreme Court in the *Burley* decisions held that the rights accorded by § 153 First (j) ". . . 'are statutory rights, which he may exercise independently *or authorize the union to exercise in his behalf*'". *Czosek v. O'Mara,* 397 U.S. 25, 28 n. 1 (1970), quoting *Burley I, supra,* at 740 n. 39 (emphasis added). The question of actual notice is important only insofar as it infers authority by estoppel. "Even the ordinary law of agency attributes authority to a representative to act when the principal stands by with knowledge or notice of his assumption of that authority and permits the third person to act to his injury upon the same assumption." *Burley II, supra,* at 665 n. 7. Thus, the Second Circuit in *Pyzynski v. New York Central R.R.,* 421 F.2d 854, 859, 860 (2nd Cir. 1970), stated:

> "The *Burley* decisions may be said to have held that a carrier may rely on the authority of a union to negotiate a conclusive settlement of an employee's grievance if it can be shown either that the union acted upon the basis of actual authority, whether individually given or to be gathered from the union constitution or by-laws or from custom and usage *or* that the employee had notice or knowledge of the actions taken by the union in his behalf and took no steps to negate the union's authority." (emphasis added)

The dictates of *Burley* have been satisfied in the instant case both by granted authority (individually given and

by the union constitution) and the actual knowledge possessed by Cole.

Nor do I understand *Kotakis v. Elgin, J. & E. Ry.,* 520 F.2d 570 (7th Cir. 1975); *Illinois Central R.R. v. Whitehouse,* 212 F.2d 22 (7th Cir. 1954), *rev'd on other grounds,* 349 U.S. 366 (1955), and *Hunter v. Atchison, T. & S.F. Ry.,* 188 F.2d 294 (7th Cir. 1951) to have expanded *Burley I* and *Burley II* to invalidate the Board hearing in the instant case.

In *Kotakis, supra,* at 576, the court simply observed:

> "Moreover, the record discloses that plaintiff knew his grievance had been submitted to the adjustment board and that he had authorized the union to represent him here. That satisfies the notice requirement."

In *Illinois Central v. Whitehouse, supra,* the court held only that the notice was required to be sent to a second union in a dispute primarily between the railroad and petitioning union because the second union's interests were impinged, and finally, in *Hunter v. Atchison, supra,* the court held that "actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required". However, plaintiffs in *Hunter* were not members of the union which had petitioned the Board to decide whether its members or plaintiffs were entitled to certain jobs with the carrier. Therefore, there was obviously no question of whether the union was authorized to act on behalf of plaintiffs. It was not. Their interests were adverse.

The effect of the majority opinion, as I see it, is to give the employee and the union a second bite of the apple merely by their mutual agreement that union representation was inadequate, a confession easy to make when the union suffers no penalty and difficult, if not impossible,

to refute by the Board or the carrier since neither has been privy to the incident.

The better course, I believe, is to leave the employee to his remedy against the union for breach of its duty of fair representation. It is significant, I think, that this duty was originally created in the specific context of the Railway Labor Act, *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). *Steele* in turn provided the blueprint for *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). See also *Czosek v. O'Mara*, 397 U.S. 25 (1970). Resort to this line of decisions as a remedy for the type of complaint here has the advantage of preserving the integrity of established grievance procedures. The Board and the carrier may deal with confidence with the union. The union is not undercut by Board and carrier efforts to by-pass it in order to ascertain whether it actually represents the employee. The employee benefits because the union will be encouraged to present the carrier's best case the first time around and may be penalized by its failure to represent the employee fairly.

Finally, I am unable to see upon the facts in this case how more formal or direct notice to Mr. Cole would have affected his course of action. He clearly authorized the union to represent him. He conferred with the union and acted on its advice and counsel. The difficulty is not in the notice; it is in the advice which the union gave Cole after the notice. As a practical matter a union member will invariably follow the advice of his union agent over the advice contained in a notice given him by the carrier or the Board, however formal or detailed.

I would reverse the judgment of the district court and remand for entry of judgment denying enforcement of the award.

OPINION AND ORDER OF THE DISTRICT COURT

(Filed May 5, 1975)

No. C 73-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

L. F. COLE,
Plaintiff,

vs.

THE NATIONAL RAILROAD ADJUSTMENT BOARD, *et al.*,
Defendants.

OPINION and ORDER

WALINSKI, *J.*:

This cause is before the Court on plaintiff's motion for summary judgment and defendants' corresponding motion to vacate this Court's earlier Order of February 6, 1974. Both sides have extensively briefed these matters.

Before resolving this dispute, it is useful to set out briefly the past developments in this case. This cause was originally filed February 9, 1973, as a petition under § 3 First (q) of the Railway Labor Act to set aside an award of a special adjustment board which had upheld plaintiff's dismissal from employment with the defendant. On February 6, 1974, this Court, upon cross motions for summary judgment, ordered this cause remanded to the special adjustment board [hereinafter the Board] for re-

consideration upon due notice to the plaintiff and that he be afforded the opportunity to be heard through counsel and present evidence on his behalf. The decision was based on the Court's conclusion that plaintiff had not been given due notice of the Board's hearing and had been denied the opportunity to be heard through counsel and to present evidence.

The Board was subsequently reconvened and after due notice held a hearing on August 19 and 20, 1974, at which plaintiff was heard through counsel and presented evidence. Thereafter, on October 28, 1974, the Board entered an award in favor of plaintiff in which he was restored to duty with full seniority rights, vacation, and all privileges. His discharge from employment was converted to a disciplinary lay-off of 365 days, and he was awarded back pay for the time from the end of the disciplinary lay-off to the date of restoration to duty. By his motion for summary judgment, plaintiff seeks to have this award enforced, pursuant to § 3 Second of the Act.

Defendant not only opposes enforcement of this award, but also asks the Court now, nearly fifteen (15) months afterward, to go back and set aside the February 6, 1974 Order of the Court on the grounds that a statement was "erroneous" and that plaintiff in fact had actual knowledge of the first hearing by the Board at which plaintiff's discharge was considered. Plaintiff argues in rebuttal that defendant's motion is untimely according to the provisions of Rules 59 and 60, Federal Rules of Civil Procedure, and that if defendant objected to the February 6th Order, he should have complied timely with these rules or have taken an appeal since the February 6th Order was clearly a final, appealable Order.

There is no doubt in the Court's mind that defendant is correct in arguing that a separate document had to

be filed in compliance with Rule 58 in order for the time limitations of Rules 59 and 60 to be applicable. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Columbus Coated Fabrics v. Industrial Comm. of Ohio*, 498 F.2d 408 (6th Cir. 1974).

However, the Court is troubled by letting defendant now reopen the issues underlying the February 6th Order, especially after the matter has been remanded to the Board, new hearings held, and an award entered. Obviously, the prejudice and expense to plaintiff are great in so doing. Plaintiff, quite properly, had reason to believe that these matters were decided and at rest, in the face of defendant's failure to appeal, or move for reconsideration, *before* the Board's rehearing. It could be fairly said that defendant is guilty of the very kind of wait-and-see-which-way-the-wind-blows tactics which it accuses plaintiff of pursuing before this lawsuit was filed.

Any prejudice to defendant in refusing now to reopen the February 6th Order is avoided, however, if defendant's contentions regarding due notice and actual knowledge are without merit. These new contentions stem from certain responses given by plaintiff during an oral deposition on February 13, 1975. From these it is now argued that plaintiff had actual knowledge of the Board's first consideration of the matter, sufficient to constitute due notice, and that he stood by and "allow[ed] matters to be thrashed out to a conclusion." Only then, disappointed with the result, did he file the present suit claiming he was deprived of notice and an opportunity to be heard.

The Court has carefully reviewed the transcript of this deposition and has concluded that, even if defendant is given the benefit of all favorable inferences, nothing therein sustains its argument. (The relevant portions are attached hereto as an appendix.) It should be remembered

in this context that the kind of notice or knowledge, required by § 3 First (j) is, in the words of one court:

> "[a]ctual notice of the hearings for a sufficient period prior thereto to permit [plaintiff] to be present and to be heard * * *." *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951).

Even assuming that plaintiff's answers could be held to be an admission that he had actual knowledge that "proceedings [were] pending before the [Board] to dispose of" his claim, an assumption the Court has no hesitation in rejecting, there are compelling doubts that he had any such knowledge in sufficient time to permit him to retain counsel, gather his witnesses and be present at the Board's hearing so as to be heard. Moreover, it is clear, notwithstanding whether the Union breached any duty of fair representation in telling plaintiff that he could not be present at the Board's hearing, that all doubts would have been removed if the Board itself had simply served formal notice on the plaintiff of the pendency of its proceedings. There can be no doubt that this is a clear duty imposed on the Board by § 3 First (j) of the Act.

Defendant also argues, in this regard, that plaintiff had authorized the Union to handle his grievance and to represent him before the Board and that plaintiff did not act, as his Union Constitution required him to do, so as to revoke the authority and assume his own representation.

It is true as defendant argues that:

> "A carrier may rely on the authority of a union to negotiate a conclusive settlement of an employee's grievance if it can be shown either that the union acted upon the basis of actual authority, whether individually given or to be gathered from the union constitution or by-laws or from custom and usage or that the employee had notice or knowledge of the actions taken by the union in his behalf and took no steps to negate the union's authority." *Pyzynski v. New York Cent. Rd. Co.*, 421 F.2d 854, 859-60 (2nd Cir. 1970), *interpreting Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), *on rehearing* 327 U.S. 661 (1946).

Within the context of the facts of *Pyzynski*, this Court is in complete agreement with that proposition.

However, in the case at bar, there is no written authorization empowering the union to represent plaintiff at the Board hearing and relinguishing his right to be present with counsel, as there was by analogy in *Pyzynski*. *Id.* fn. 9 at 860. Moreover, as has been shown, plaintiff could not be said to have had notice or knowledge of the actions taken by the union on his behalf. Here all he "knew" was a sort of a vague notion that the union would "get his job back."

Moreover, this Court feels that company reliance on the Union Constitution or by-laws or on custom and usage is more appropriate where the dispute involves a group of its employees over, e.g., which union's members are going to perform a specific job. In that kind of dispute, it is clear that the policies of peaceful settlement through collective bargaining which underlie our federal labor laws dictate that the railroad may reasonably rely on the apparent authority of the union to settle the matter or represent its members before a board of arbitration.

These policies give way however when the dispute is between a single employee and the company who employs him. In such a case the union's interest in settling such a dispute, and the character of representation it feels

it can give, are often at odds with the individual's interest in preserving his means of livelihood. Thus, in recognizing these interests, Congress specifically gave the employee the right to appear on his own, and with his own counsel, in hearings which will decide the issue of greatest importance to him.

This Court obviously feels, unlike the *Pyzynski* court, that subsequent events since the *Burley* decisions have not diminished any urgency to give individual employees considerable leeway in pursuing their own grievances. *Pyzynski, supra* at 861-864. A union member faces considerable obstacles in attempting to establish a claim of breach of the duty of fair representation by his union. In order to make such a claim plaintiff would have to prove "arbitrary or bad faith conduct on the part of the union." *Vaca v. Sipes,* 386 U.S. 171, 193 (1967). He would, moreover, find it necessary:

> "to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives * * *." *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 301 (1971).

Since the union is entitled by federal labor policy to make good faith judgments as to when and how far it will press an individual employee's grievance, and the same federal policies dictate a need that the union may only be sued by that member for bad faith, intentionally severe, and irrational conduct, it is clear that there is a definite need for considerable leeway to permit the member to pursue his own grievance. Otherwise, the member is left with the impossible situation of permitting the union to press his claim behind closed doors and giving him no practical legal remedy when the union's representation has been deficient.

The fact that an employee may be required to join the union only points up more clearly the urgent need for permitting him to press his own claim and to secure his own future.

> "Men at some time are masters of
> their fates:
>
> The fault, dear Brutus, is not
> in our stars,
>
> But in ourselves, that we are
> underlings."

Shakespeare, *Julius Caesar,* Act I, scene ii.

Finally, in arguing that plaintiff failed to act affirmatively so as to assume his own representation, defendant appears to overlook the extent to which plaintiff seems to have been deceived, albeit unintentionally, by the appearance of regularity.

Plaintiff claims, and defendant does not dispute, that he contacted union officials and specifically stated his interest in being present at the hearing. He further stated that he had witnesses who would apparently testify about the events which led to his dismissal and that he wanted to have them present; but the union told him that that wouldn't be necessary and that he didn't need to bring his witnesses. Thus, it is apparent that plaintiff was denied any opportunity to conduct his own representation before the Board which, failing to notify him formally of the pendency of its proceedings and his right to be present, helped to foster this illusion of propriety.

In *Hollingsworth v. Balcom,* 441 F.2d 419 (6th Cir. 1971), the court considered a claim by a naval reservist who contended that he had been denied notice that a hearing crucial to his application for discharge as a con-

scientious objector, was to be held and that his failure to object to continuation of the hearing did not constitute a waiver of his right to have counsel present. The district court had found that when he was summoned for an interview with his commanding officer, he was not told that it was to be the crucial hearing. He was further told that it would not be necessary to bring his lawyer with him in spite of the commanding officer's knowing that the reservist had consulted counsel.

In agreeing with the reservist's contentions, the Sixth Circuit said:

> "[a]ccepting as we must the finding of the District Court that appellant must have realized at some point that the [hearing] was being held, we think that the lack of prior notice and the 'appearance of regularity' [citing *Yellin v. United States*, 374 U.S. 109, 123 (1963)] dissuaded him from objecting. We cannot agree that his failure to stop the [hearing] amounted to a waiver of his right." *Id.* at 424.

This Court feels that much the same considerations apply here. Without a formal notice from the Board, plaintiff was foreclosed from making the very decision which § 3 First (j) empowers him to make; thus, his failure to act affirmatively cannot be held to have been a waiver of his right. Accordingly, the Court has concluded that the February 6th Order shall stand that that defendant's motion is not well taken.

As to plaintiff's motion for summary judgment, it is equally clear that he is entitled to have the Board's award of October 28, 1974, enforced. Section 3 First (p) provides for such enforcement and all of the procedural requirements appear to have been followed. The Court sees no need for any further delay in plaintiff resuming the employment to which the Board felt he was entitled.

Accordingly, it is

ORDERED that the Award of Public Law Board No. 855 of October 28, 1974, relative to the plaintiff herein, be enforced in accordance with its terms, and defendant Erie Lackawanna Railway Company is hereby ORDERED to comply with the provisions of this Award.

/s/ NICHOLAS J. WALINSKI
United States District Judge

OPINION AND ORDER OF THE DISTRICT COURT

(Filed February 6, 1974)

No. C 73-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

L.F. COLE,
Plaintiff,

vs.

THE NATIONAL RAILROAD ADJUSTMENT BOARD, *et al.*,
Defendants.

OPINION AND ORDER

WALINSKI, *J.*:

This cause is before the Court on cross motions for summary judgment. Both motions have been supported by affidavits as well as extensive briefs. There appears to be absolutely no dispute as to the relevant facts.

Petitioner brings this cause as a petition to review a decision of a special adjustment board created pursuant to 45 U.S.C., § 153, Second. He argues that the Board decision should be set aside because *inter alia* of the failure of the Board to give due notice of all hearings to him, the failure to hear him in person, by counsel or by other representatives, and the failure of the Board to conduct hearings and allow him to present witnesses on his behalf.

The respondent railroad contends that this Court lacks jurisdiction to review a decision of a special adjustment board created pursuant to 45 U.S.C., § 153, Second, and that the decision is final and binding on the parties. Alternatively, respondent argues that there was no defect in notice or the opportunity to be heard that rises to the level of a denial of procedural due process.

It appears that the facts which gave rise to this dispute began on March 16, 1971, when the petitioner, an employee of the respondent, was assigned to provide flag protection for men engaged in the construction of a highway bridge over the railroad's tracks near North Lewisburg, Ohio. It appears that he arranged for an employee of the construction crew to drive out on to the track so as to flag any oncoming trains while he stayed near a telephone in order to receive, as instructed, information from his railroad employer as to the scheduling of trains through the area. The construction worker, not a railroad employee, apparently flagged an oncoming train to a stop several car lengths from the construction site. As a result of this, petitioner received a letter from respondent on March 22, 1971, that an investigation hearing concerning the incident would be held four days later in the office of the employer. The letter further stated that Cole had allegedly violated several company regulations, all of which were of such a general character that he must have been

bewildered as to the precise nature of his infraction and how best to prepare for his defense.

In any event, the hearing was held on March 26th and petitioner was notified on April 7, 1971, that, as a result thereof, he had been dismissed from his employment. On September 2, 1971, the general manager in charge of labor relations for respondent denied Cole's intercompany appeal.

Apparently Cole now decided to pursue the grievance procedure as provided by the relative collective bargaining agreement. The union and the company had apparently resorted in the past to the provisions of 45 U.S.C., § 153, Second, which permits a railroad and union to create a special board of adjustment to settle minor disputes and grievances. And so, the parties entered into such an agreement on December 10, 1971, to create Public Law Board 855 [hereinafter the Board], and further agreed that petitioner Cole's grievance would be one of the matters submitted to the Board for decision.

At this time Cole had long since been dismissed from the railroad's employment. The facts further show that he probably terminated his membership in the union after April, 1971. The affidavit submitted by the company's general manager shows that union dues were deducted from Cole's pay in March, 1971, for the following month. And Cole states in his affidavit that he was not a member of the union when the Board decided his case.

Both the company and the union made a presentation to the Board concerning Cole's grievance. There is no record of any presentation by Cole himself. The Board's decision on June 1, 1972, states that all the parties to the dispute were given due notice of the hearing; but there is nothing in the record showing any notice to peti-

tioner of any impending hearing. Moreover, Cole's affidavit, uncontroverted by anything from respondent, shows that he received no notice of any kind, that he did not designate anyone to appear on his behalf, and that no witnesses appeared on his behalf. The Board affirmed the company's dismissal.

In his petition before this Court petitioner invokes jurisdiction under 45 U.S.C., § 153, First (q), and prays that the Board's decision be set aside and that he be reinstated to his former position with the railroad with full seniority and other rights, and that he recover back pay to the date of his dismissal as well as attorney fees.

Respondent argues that § 153, First (*q*), is appropriate only to review decisions of the National Railway Adjustment Board, and that since this is a decision of a special adjustment board created under § 153, *Second*, this Court lacks jurisdiction. Even if the Court has jurisdiction, it is further contended that the Court is powerless to do anything but affirm the Board order, set it aside in whole or part, or remand to the Board for further proceedings. Respondent finally argues that this petition reveals no basis to do anything but affirm the Board order since Cole was represented by the union and therefore had due notice.

Before deciding these issues, the Court finds it useful to review some of the legislative history of the relevant statute. What is now § 153, *Second* originated in 1966 as an amendment to the Railway Labor Act, 45 U.S.C., §§ 151 *et seq*. That Act, passed in 1934, had created the National Railroad Adjustment Board [hereinafter the NRAB] to settle disputes in the nation's railroads as to pay disputes, rules or working conditions. The NRAB had worked well in many respects, but by the mid-1960's, a backlog of cases had built up in two of its four divisions.

Moreover, while the original Act had provided for a limited form of judicial review in the district courts, there was no way that an employee who was aggrieved by an NRAB decision against him could obtain judicial review. However, a railroad, against whom the NRAB had made an award, could obtain review simply by declining to comply with it. Therefore the Congress felt that equal opportunity for access to the courts for limited review should be afforded and that some means for settlement of minor disputes short of going to the NRAB should be provided. The result of all this was H. R. 706 which was passed in February, 1966, by the House of Representatives.

The bill amended 45 U.S.C., § 153, *Second* so as to empower the railroads and unions to create special boards of adjustment to settle minor disputes. Section 153, *First* (q) was added so as to equalize the limited means of judicial review of NRAB decisions. The Senate Committee Report further noted that:

> "The bill also provides that judicial review of orders * * * of boards established under this legislation, relating to minor disputes in the railroad industry would be available to either party * * *." Senate Report No. 1201, 89th Congress, 1966 *U. S. Code Cong. & Admin. News* 2285, at 2289.

The bill was then passed by the Senate June 7, 1966, and signed into law.

From the foregoing, it is clear that respondent's contentions as to this Court's lack of jurisdiction are not well taken. His contention, that the final sentence of § 153, Second means that a district court only has jurisdiction to review an award in favor of petitioner, would lead to the very condition of unequal access to the courts that Congress sought to eliminate. Respondent cannot

seriously mean that Congress, in creating the special boards of adjustment, intended to provide for the very kind of inequitable form of judicial review which had led it in part to amend the RLA in the first place. Most of the courts which have considered this contention have rejected it. *See, e.g., Trans.-Comm. Div.—Brotherhood of Railway Employees v. St. Louis-San Fran. R. Co.*, 419 F.2d 933, 935 (8th Cir. 1969); *U.T.U. v. Pitts, Chartiers & Youghiogheny R. Co.*, 353 F. Supp. 1305, 1306 (W.D. Pa. 1973); *Brotherhood of Railway Carmen v. St. Louis-San Fran. R. Co.*, 334 F. Supp. 764, 768-9 (W.D. Mo. 1971); *U.T.U. v. Patapsco & Back Rivers R. Co.*, 327 F. Supp. 608, 610-12 (D. Md. 1971); *Barrett v. Manufacturer's R. Co.*, 326 F. Supp. 639, 643-4 (E.D. Mo. 1971); *Balt. & Annap. R. Co. v. National Mediation Bd.*, 321 F. Supp. 51, 55-7 (D. Md. 1970); and *Switchmen's Union v. Clinchfield R. Co.*, 310 F. Supp. 606, 610-11 (E.D. Tenn. 1969), *aff'd*, 427 F.2d 161, *cert. denied*, 400 U.S. 824. Therefore this Court holds that it has jurisdiction over the subject matter of the petition now before it.

Having established that it has jurisdiction to review the decision of the Board, the Court takes notice that its scope of review is very narrow. Section 153, First (q), provides that the Court may affirm the Board decision, or set it aside, or remand the proceeding to the Board for further action. The decision of the Board may only be set aside or remanded:

> "* * * for failure of the [Board] to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order." 45 U.S.C., § 153, First (q).

Petitioner claims that the Board failed to comply, in making its decision, with the requirements of 45 U.S.C., § 153, First (j) which states as follows:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The respondent railroad vigorously contends that this section does not apply to proceedings before a special adjustment board; and that, in any event, petitioner was ably represented by his union. This Court feels that repondent's contention ignores the legislative history, as well as the plain language, of the statute.

The previously mentioned Senate Committee Report explicitly stated that judicial review of special adjustment board decisions would specifically include, like NRAB decisions, whether the tribunal complied with the statutory requirements. 1966 *U.S. Code Cong. and Admin. News* 2285, at 2289. Moreover, since § 153, Second incorporates § 153, First (q), the former also incorporates § 153, First (j), since it is a requirement of the chapter. *See Central of Ga. R. Co. v. U.T.U.*, 353 F. Supp. 293, 301 (S.D. Ga. 1973). *Cf. Baltimore & Annap. R. Co. v. National Mediation Board*, 321 F. Supp. 51 (D. Md. 1970).

It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner was not sent, and did not receive, any notice that his petition was being considered by the Board. Having been deprived of due

notice,[1] he was surely deprived of the right to appear either in person or through counsel as the statute permits.

This Court is further unable to understand how petitioner could have been represented by a union of which he was no longer a member. The rights of this petitioner in claiming his former position are too important to be waved away with the airy contention that the union represented him. This Court questions the vigor of a union representing a former member from whom it no longer receives monthly dues. For this reason, this Court holds that petitioner was not represented before the Board and that its decision must be set aside. *See Elgin, Joliet & Eastern, R. Co. v. Burley,* 325 U.S. 711, 748 (1945). *Compare Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541 (7th Cir. 1957).

One final matter remains. Petitioner named the NRAB as a party to this suit. Yet it is apparent from all of the foregoing that the NRAB is not really a proper party, while Public Law Board No. 855 is. Therefore, the NRAB will be dismissed and petitioner will be granted leave to amend his petition so as to name Public Law Board No. 855 as a respondent party.

For the foregoing reasons,

IT IS ORDERED that the decision of Public Law Board No. 855 of June 1, 1972, relative to the petitioner herein, be, and hereby is, set aside and held to be null and void.

---

1. It should be noted that the regulations which petitioner allegedly violated are so vague as to raise serious question as to defend against the charges. On remand the Board should consider the propriety of ordering reinstatement in view of that fact.

IT IS FURTHER ORDERED that the matter be, and hereby is, remanded to Public Law Board No. 855 for reconsideration upon due notice to the petitioner, and that he be given the opportunity to be heard through counsel and to present witnesses on his behalf.

Supreme Court, U. S.
FILED
JAN 27 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, L. F. COLE, IN OPPOSITION

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Supreme Court of the United States

October Term, 1976
No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, L. F. COLE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

L. F. Cole, Respondent, opposes Erie's Petition for Writ of Certiorari.

RESPONDENT'S SUMMARY OF FACTS FOUND BY THE DISTRICT COURT

The District Court in its February 6, 1974 Order factually determined the Respondent Cole, as a result of an incident occurring on March 11, 1971, was dismissed by Petitioner from his employment on April 7, 1971. The District Court further determined that Cole was not a member of the union after April, 1971 (App. pp. A31-A32).

The District Court in its same order found the union and the Petitioner entered into an agreement on Decem-

ber 10, 1971—some eight (8) months after Respondent Cole had been dismissed from his employment and ceased to be a member of the union—to create a special board of adjustment under the provisions of 45 U.S.C. § 153, Second, namely Public Law Board 855. The Petitioner and the union further agreed that Respondent Cole's discharge would be one of the matters submitted to this Board for decision (App. p. A31).

The District Court also found the evidence, uncontroverted by anything from Petitioner and including the Board's decision of June 1, 1972, showed Respondent received no notice of any kind, that he did not designate anyone to appear on his behalf, and that no witnesses appeared on his behalf (App. p. A32).

The District Court further found in regard to the Board's hearing, as follows:

> ". . . there is nothing in the record showing any notice to petitioner (Respondent in this Court) of any impending hearing." (App. pp. A31-A32).

In its February 6, 1974 Order, the District Court set aside and held for naught the decision of June 1, 1972, of Public Law Board No. 855 relating to Respondent's discharge. The District Court ordered that the matter be remanded to the Board for reconsideration upon due notice to Respondent and that he be given the opportunity to be heard through counsel and present witnesses on his behalf (App. pp. A36-A37).

The Respondent was given due notice of a hearing of the *reconvened* Board held on August 19th and 20th, 1974. Petitioner was present with counsel. Petitioner and the union both made hearsay presentations to the *reconvened* Board. Respondent presented five (5) witnesses who testified under oath and were cross-examined by Petitioner and

its counsel. The Board also received in evidence four (4) exhibits offered by Respondent.

On October 28, 1974, the *reconvened* Board established by the District Court's February 6, 1974 Order, entered an award restoring Respondent to duty with full seniority rights, vacation and privileges. Respondent's discharge from employment was converted to a disciplinary lay-off of 365 days, and he was awarded back pay for the time from the end of the disciplinary lay-off to the date of restoration to duty (App. p. A22).

Petitioner failed to comply with the Board's award and Respondent, by Motion for Summary Judgment, sought enforcement of the award of the *reconvened* Board. Petitioner resisted enforcement of the award. Some fifteen (15) months after the District Court's February 6, 1974 Order, Petitioner attempted to set it aside (App. p. A22).

In its May 5, 1975 Order, the District Court, after considering all the evidence, concluded that even if Petitioner were given the benefit of all favorable inferences from the evidence, Respondent had not received formal notice under § 3 First (j) of the Act and Respondent had no "actual notice" as defined by prior case law relied on by Petitioner. The District Court rejected Petitioner's claim on this issue and determined that any notice had by Respondent was not in *sufficient time* to permit him to retain counsel, gather witnesses and be present at the Board's hearing so as to be heard (App. pp. A23-A24).

The Petitioner also at that late date and for the first time argued Respondent had solely authorized the union to handle this wrongful discharge. The District Court, after considering the evidence, found Respondent had not given written authorization to the union and he had not relinquished his right to be present with counsel (App. pp. A25-A26).

Finally, the District Court in its May, 1975 Order found the undisputed evidence, on the issue of the right of Respondent to represent himself before the Board, to be that union officials knew of his interest in being present at the hearing. Further, Respondent had witnesses who would appear and testify relevant to the events leading to his dismissal, that he was told that his presence was not necessary and that he didn't need to bring his witnesses. This evidence was not refuted by Petitioner (App. p. A27).

OPPOSING ARGUMENT

In this Opposing Argument, Respondent will repeat the format of Petitioner's Argument. Each heading will be followed by Respondent's opposing arguments.

A. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision Concerning an Important Issue of Federal Law and National Labor Policy, Which Decision Is in Conflict With Prior Decisions of This Court and With Prior Decisions of the United States Court of Appeals for the Seventh Circuit.

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provisions of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in Elgin, J. & E. Ry. Co. v. Burley (Burley II), 327 U.S. 661 (1946).

In its brief the Petitioner attempts to sustain its position by presenting only those facts in its brief that are most favorable to its position, and then arguing on those facts

that the District Court and the Sixth Circuit Court of Appeals rendered decisions which are in conflict with prior decisions of this Court and the Court of Appeals for the Seventh Circuit. The Petitioner would have this Court review the evidence in this case, and find the facts in its favor, contrary to the well established principle that a writ of certiorari will not be allowed to review evidence or inferences drawn from the evidence. *General Talk. Pictures Corp. v. Western El. Co.*, 304 U.S. 175 (1938).

The language of the Court of Appeals for the Sixth Circuit that:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14),

is just one more statement of law pertaining to notice. It deals with only one aspect of actual notice, to-wit, the period of time the notice must be given before the hearing. This is not in conflict with the statement in *Burley II* (App. p. A17), that:

> ". . . It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency."

This statement from *Burley II* assumes that the notice would be timely. Certainly, this Court in *Burley II* never intended that notice, of whatever nature, could be considered "due notice" if it was given, for example, five minutes before the hearing.

It is submitted that "due notice" was a factual determination to be made by the District Court, based upon the facts before it at the time of its decision. At the time the District Court made its original order of February 6, 1974, Respondent's deposition was not before the Court and there was no evidence before the Court that Respondent had received any notice whatsoever.

The Sixth Circuit considered Respondent's deposition, even though it was not before the District Court on February 6, 1974, and also made a finding of fact that Respondent did not receive due notice. This Court should not grant certiorari to review this finding of fact.

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly is representing him, is contrary to this Court's construction of the statute as stated in Elgin, J. & E. Ry. Co. v. Burley (Burley I), 325 U.S. 711 (1945), and Czosek v. O'Mara, 397 U.S. 25 (1970).

Respondent submits this is not a correct statement. *Burley I* supports Respondent's position; it does not support Petitioner's position on this issue.

In *Burley I, Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711 (1945) this Court made the following statements (Page references are to 325 U.S.).

At page 727:

". . . Rights of notice, hearing and participation or representation are given. § 3, First (j)."

At pages 734 and 735:

"The Act's provisions do not require such a construction. On the contrary they appear expressly to preclude it. The proviso to Section 2, Fourth in terms reserves the right of 'an employee, *individually*' to confer with management; and Section 3, First (j), not only requires the Board to give 'due notice of all hearings *to the employee* * * * involved in any disputes submitted * * *,' but provides for 'parties' to be heard 'either *in person,* by counsel, or by other representatives, as they may respectively elect.'

"These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard 'in person.' Nor would the provision for notice 'to *the employee* * * * involved in any dispute' be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose."

At page 746:

". . . The matter requires some explication in the light of the view we have taken concerning the rights of an aggrieved employee in the settlement of grievances. In that view no valid settlement can be made unless he agrees. If settlement by agreement after negotiation fails, he has the right to submit the dispute to the Board for decision. If it is submitted he has rights of notice, hearing and individual representation according to his choice."

Burley II, Elgin, J. & E. Ry. Co. v. Burley, 327 U.S. 661 (1946), did not change the law as announced in *Burley I, supra.*

> "We adhere to our decision rendered in the opinion filed after the first argument. 325 U.S. 711, 65 S.Ct. 1282. [1] That opinion expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the adjustment Board. We do not attempt to do so now . . ."

1. The petition for rehearing, which resulted in setting the case for reargument, was supported by motions filed amicus curiae by various labor organizations and by the office of the Solicitor General. Upon granting of the motions, those organizations and the Solicitor General filed briefs amicus curiae and the latter participated in the argument. Various positions were taken upon the merits which we have considered but do not find it necessary to set forth.

The briefs amicus curiae, mentioned in footnote 1, *supra*, were reviewed by Mr. Justice Frankfurter in his dissent in *Burley II, supra.* In general these briefs were to the effect that *Burley I* "created havoc in the railroad world" (327 U.S. at 674) by its decision that:

> "An award of the Railroad Adjustment Board cannot be effective against aggrieved employee unless he is represented individually in the proceedings in accordance with rights of notice and appearance or representation granted to him by statute, and mere proof that collective agent appeared and purported to act for

> employee is insufficient, but proof that a collective agent was in some legally sufficient way authorized by the employee to act in his behalf is necessary. Railway Labor Act 1934, Sec. 2, subds. 1-4, 6, 8, Sec. 3, subd. 1 (i, j, m, p), 45 U.S.C.A. Sec. 152, subds. 1-4, 6, 8, Sec. 153, subd. 1 (i, j, m, p)." *Burley I*, Syllabus 10, *supra.*

This is the law that was followed by the District Court and the Sixth Circuit in making their decisions.

These courts followed the statement of law that ". . . mere proof that collective agent appeared and purported to act for employee is insufficient." There is no reason for this court to grant certiorari to reconsider this statement. This statement of law was definitely decided by *Burley II*. Mr. Justice Frankfurter in his dissent in *Burley II* at page 673 (327 U.S.) quotes from a brief submitted by the Congress of Industrial Organization and other labor unions as amici curiae as follows:

> "We submit the act requires union settlements with the right accorded to the employee to present grievances but not to participate in their disposition."

This proposition, which is what Petitioner contends, was not accepted by this Court when it decided *Burley I* and *Burley II*.

In addition, the lower courts herein applied the statement of law that ". . . proof that a collective agent was in some legally sufficient way authorized by the employee to act in his behalf is necessary." The District Court, in effect, found that the union was not in some legally sufficient way authorized by Respondent to act on his behalf. The Sixth Circuit affirmed, approving this statement of law. Thus, there is no conflict in the Sixth Circuit decision and *Burley I*.

The interpretation of 45 U.S.C. 153 First (j) is not an important question of federal law which has not been, but should be, settled by this Court. The question was settled by *Burley I* on June 11, 1945. Apparently Congress is satisfied with this Court's interpretation of 45 U.S.C. 153 First (j), since, in over thirty years since the *Burley I* decision, Congress has not amended the statute.

The Court did not construe Section 3, First (j) of the Railway Labor Act in *Czosek v. O'Mara*, 397 U.S. 25 (1970), and this *Czosek* case is not authority for Petitioner's contention that notice is not required to the employee.

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including Kotakis v. Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975) and Hunter v. Atchison, T. & S. F. Ry. Co., 188 F.2d 294 (7th Cir. 1951).

Due notice is a requirement of the Railway Labor Act. 45 U.S.C. 153 First (j). The case of *Kotakis v. Elgin, J. & E. Ry. Co.*, 520 F.2d 570 (7th Cir. 1975), had nothing to do with a failure to comply with the requirements of the Railway Labor Act. The Court stated on page 574:

> "This statute shows that the findings of the Board are conclusive except in three instances. Count I of the Complaint does not charge that the Third Division failed to comply with the requirements of the Railway Labor Act or that there was fraud or corruption by a member of the Third Division. Instead, plaintiff argues that the Board's order was not confined to matters within the scope of the Third Division's jurisdiction. We disagree."

The Court further stated on page 576:

> "As to plaintiff's conteniton that the Adjustment Board award was a nullity for failure to provide him written notice of the Board's hearings under Section 3 First (j) of the Act (45 U.S.C. § 153 First (j)), since Count I of the complaint does not attack the failure of the Board to give such notice and no such argument was made in the district court, it is not properly before us . . ."

The *Kotakis* case (7th Circuit) is not contrary to the Sixth Circuit's decision herein since the matter of the ". . . failure of the board to give such notice . . ." was not before the Court in the *Kotakis* case.

Also, there is no conflict between the Sixth Circuit decision herein and the case of *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951). Syllabus 9 of *Hunter* is:

> "Under Railway Labor Act provision that due notice of all hearings should be given to employees and carriers involved in any disputes submitted to Railroad Adjustment Board, actual notice for sufficient period before hearings to permit persons involved to be present and to be heard is sufficient. Railway Labor Act, § 3, subd. 1 (j), 45 U.S.C.A. § 153, subd. 1 (j)."

And on page 301, the Court stated:

> "The statute requires the Adjustment Board to give due notice of all hearings to the employees involved in the dispute before it, and not merely notice of the fact that proceedings may be pending before the Board."

The *Hunter* opinion, on page 300, quotes from *Estes v. Union Terminal Co.*, 5th Cir., 89 F.2d 768, that:

". . . But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. . . . No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. . . ."

This is the tenor of the decision of the District Court herein, which was affirmed by the Sixth Circuit. There is no conflict in the understanding of the law by the Fifth, Sixth or Seventh Circuits.

B. Even Assuming the Court of Appeals' Definition of "Actual Notice" to Be a Correct One, the Court Erred in Holding That Respondent Had Not Received Such "Actual Notice".

In its first paragraph under this contention the Petitioner is incorrect in stating the majority admits that: "(4) both the union and the employee knew in advance when the hearing before the board was scheduled (App. p. A16)." What the majority said was, ". . . that he knew in advance that the Board would be conducting a hearing on his claim." There is nothing in the record that shows that Respondent knew the date, time and address of the hearing. Also, Petitioner glosses over the ramifications of the fact that Respondent was not a member of the union after his discharge.

The decision of the District Court that Respondent did not receive "due notice" was a finding of fact. A petition for writ of certiorari should not be granted to review evidence or inferences drawn therefrom.

Under this heading, the Petitioner attempts to argue that as a result of the Sixth Circuit decision the carrier is placed in an untenable position. This is not true. The

Sixth Circuit followed the law as set out in *Burley I* and affirmed in *Burley II*. The carrier is in no different position now than it was prior to the Sixth Circuit decision.

In this case the Petitioner, a carrier, is objecting to notice to the employee. In other cases carriers have taken the opposite position. Compare, *Illinois Cent. R. Co. v. Whitehouse*, 212 F.2d 22 (7th Cir. 1954), where the Court stated on page 29:

". . . The reasoning in *Kirby v. Pennsylvania, R. Co.*, 3 Cir., 188 F.2d 793, 799, is pertinent, wherein the Court stated: 'Until the statutory requirements are met, it (the Board) has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies'."

and *Burlington Northern, Inc. v. Am. Ry. Sup'rs Ass'n*, 527 F.2d 216 (7th Cir. 1975) where the Court stated on page 219:

"The Railroad contends that Awards 2714 and 2715 are void because Beffert and Ferrell were not given notice of the Adjustment Board proceedings under Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j), which provides in pertinent part that 'the several divisions of the Adjustment Board shall give due notice of all hearings to the

employee or employees and the carrier or carriers involved in any dispute submitted to them'."

The real problem, in cases such as this, is the Board's constant refusal to give formal notice to the employee as required by 45 U.S.C. 153 First (j), *Burley I* and *Burley II*.

In *Illinois Central R. Co. v. Whitehouse, supra,* the Court stated on page 29:

". . . Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. But it is asserted that the Clerks and Shears had no desire to be heard. Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute."

RESPONDENT'S CONTENTIONS

A. The Lower Court Decisions Herein Were Made Pursuant to Settled Law and Are Not in Conflict With Other Decisions.

This Court in *Burley I*, decided June 11, 1945, fully interpreted 45 U.S.C. 153 First (j). The pronouncements of this Court in *Burley I* have not been altered by subsequent decisions of this Court, or by any change in the statute by Congress, and there is no conflict with Appellate Court decisions since the Appellate Courts know and understand *Burley I*. Since the lower court decisions were made pursuant to settled law and are not in conflict with other decisions, the Writ should be denied.

B. There Are No Special and Important Reasons for Granting Petitioner's Writ.

What has happened in this case now before this Court is that the District Court made a factual determination in its Opinion and Order of February 6, 1974 (App. p. A29), that the Petitioner failed to prove that it "was in some legally sufficient way authorized by the employee (Respondent) to act in his behalf." *Burley I*, Syllabus 10, *supra.*

This factual determination was correct. Judge Walinski, in his Opinion and Order filed February 6, 1974 (App. p. 29), stated (App. pp. 35, 36):

"It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner was not sent, and did not receive, any notice that his petition was being considered by the Board. Hav-

ing been deprived of due notice, he was surely deprived of the right to appear either in person or through counsel as the statute permits.

"This Court is further unable to understand how petitioner could have been represented by a union of which he was no longer a member. The rights of this petitioner in claiming his former position are too important to be waived away with the airy contention that the union represented him. This Court questions the vigor of a union representing a former member from whom it no longer receives monthly dues. For this reason, this Court holds that petitioner was not represented before the Board and that its decision must be set aside. See, *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 748 (1945). Compare *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541 (7th Cir. 1957)."

In this case, the District Court simply found certain facts to be true and applied the settled law of the *Burley* cases to these facts. There is nothing special or important about a decision so rendered and the Writ should be denied.

C. Other Considerations.

Petitioner in its QUESTION PRESENTED (App. p. 2) intimates that the lower court decisions allowed Respondent to "stand by with knowledge and notice of what is going on, allow matters to be thrashed out to a conclusion before the Board, and, after a decision adverse to him has been rendered by the Board, come in for the first time to assert his individual rights." This is not what happened. The lower courts found Respondent had no knowledge or notice. There is no special or important reason why this Court should grant the Writ to review these findings.

In addition, if the Petitioner thought the District Court's decision of February 4, 1974, was so erroneous as to warrant review by this Court, the Petitioner could have appealed it as a final order. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). At that time the Petitioner must not have felt that the order of February 6, 1974, was so erroneous as to meet the Considerations Governing Review on Certiorari (Rule 19) or it would have appealed immediately. Instead, Petitioner took its chances before the *reconvened* board and then, after losing before the *reconvened* board, in the District Court and in the Sixth Circuit, determined that the February 6, 1974, order should be reviewed by this Court. In effect, the Petitioner allowed matters to be thrashed out to a conclusion before the *reconvened* board, and, after a decision adverse to it was rendered by the *reconvened* board, started for the first time to assert rights which it did not feel were important prior to the adverse decision of the *reconvened* board.

Petitioner belatedly contends that unless this Court grants its Writ and, by implication, reverses the Sixth Circuit, that an impossible burden will be placed upon the carrier with concomitant dire consequences (App. p. A24, A25). If this is true now, it was true on February 6, 1974, and the Petitioner, because of the purported seriousness of it, should have appealed the District Court's decision of that date. Since the Petitioner did not appeal at that time, it can only be surmised that the seriousness of the matter is magnified by the fact that this is Petitioner's last opportunity to win its case.

There is no burden placed on the carrier by the lower court decisions. The burden, which has been there for thirty (30) years, is upon the Board to give formal notice as required by 45 U.S.C. 153 First (j) *Burley I* and *Burley*

II. This is not an impossible burden. The giving of formal notice by courts and other hearing officers is commonplace and there is no reason it cannot be done in cases such as this.

The considerations, submitted by Petitioner in its Writ, appear to be submitted for the sole reason that Petitioner wants the decision of the *reconvened* Board reversed. This is not a valid reason to grant certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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October Term, 1976
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vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER, ERIE LACKAWANNA RAILWAY COMPANY

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REPLY BRIEF OF PETITIONER, ERIE LACKAWANNA RAILWAY COMPANY

Pursuant to Rule 24(4) of the Rules of the Supreme Court of the United States, Petitioner, Erie Lackawanna Railway Company, files this Reply Brief to address an argument first raised in Respondent's brief in opposition to the petition for certiorari.

Respondent contends at page 17 of his brief that, if Petitioner felt aggrieved by the District Court's Order of February 6, 1974, it could have, and should have, appealed that decision immediately. By so stating, however, Respondent overlooks the fact that it is well settled that a

remand order to a public law board is not a final appealable order within the ambit of 28 U.S.C.A. Section 1291.

Respondent relies upon this Court's decision in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974) for the proposition that Petitioner could have immediately appealed the February 6, 1974 decision. Unfortunately for Respondent, that reliance is misplaced because *Eisen* is not relevant to the issue of the appealability of a remand order. It merely held that a district court's order permitting a suit to proceed as a class action and allocating the cost of notice did constitute a final appealable order within the scope of Section 1291.

However, the various courts of appeals and district courts have consistently held that a remand order for further proceedings is not a final judgment within the meaning of Section 1291. *Pauls v. Secretary of Air Force,* 457 F.2d 294, 297-298 (1st Cir. 1972); *Transportation-Communications Division v. St. Louis-San Francisco Ry. Co.,* 419 F.2d 933, 935 (8th Cir. 1969), *cert. den.* 400 U.S. 818; *United Transportation Union v. Illinois Central Railroad Company,* 433 F.2d 566, 568 (7th Cir. 1970), *cert. den.* 402 U.S. 915; *Central of Georgia Railway Company v. United Transportation Unions,* 353 F. Supp. 293, 306 (U.S. D.C., S.D., Ga., 1973).

Accordingly, Petitioner did not, as Respondent contends, have the option of appealing the District Court's 1974 order immediately because that order was clearly not a final appealable order. Its only course of action was to await the entry of a final judgment, to appeal therefrom, and, at that time, attempt to have the District Court's erroneous 1974 ruling overturned.

For all the reasons set forth in Petitioner's Petition for Certiorari, and for the reason that Respondent has set

forth no meritorious grounds for denial of the Petition, the Petition for Certiorari should be allowed.

Respectfully submitted,

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No. 76-900

In the Supreme Court of the United States

OCTOBER TERM, 1976

ERIE LACKAWANNA RAILWAY COMPANY, PETITIONER

v.

L. F. COLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

DANIEL M. FRIEDMAN,
Acting Solicitor General,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the decision of a special adjustment board, convened under Section 3 Second of the Railway Labor Act, is invalid unless the labor organization authorized to represent the employee whose grievance was submitted for arbitration gave the employee a full opportunity to assist in the preparation of his case.

STATEMENT

1. Section 3 of the Railway Labor Act, 44 Stat. 578, as amended, 45 U.S.C. 153, establishes a scheme of compulsory arbitration of disputes arising under collective bargaining agreements between labor organizations and rail carriers.

Section 3 First establishes the National Railroad Adjustment Board as a standing adjudicatory body whose members are selected in equal numbers from, and paid by, the labor unions and rail carriers.[1] Matters may be brought before the Adjustment Board by either the carrier or the employee or his representative. Section 3 First (i). See generally *Elgin, J. & E. Ry. Co.* v. *Burley* (*Burley I*), 325 U.S. 711, adhered to on rehearing, *Elgin, J. & E. Ry. Co.* v. *Burley* (*Burley II*), 327 U.S. 661. "Parties may be heard either in person, by counsel, or by other representatives, * * * and * * * the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes * * * ." Section 3 First (j).

Section 3 Second of the Act provides for arbitration before special boards of adjustment, known in practice as "public law boards," that operate independently of the Adjustment Board:

> If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, * * *

[1] If the Adjustment Board becomes deadlocked in a particular case, the National Mediation Board selects a neutral person to decide the case. Section 3 First (*l*).

> or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. * * * Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. * * * If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes.

Unlike Section 3 First, Section 3 Second by its terms does not require notice to, or permit participation by, individual employees.

2. Respondent Cole was discharged from employment with petitioner Erie Lackawanna Railway Company in 1971 (Pet. App. A2, A31). Respondent, contending that his discharge was improper under the collective bargaining agreement between petitioner and the United Transportation Union, of which he was a member, took his grievance to the Union (Pet. App. A14, A31). Petitioner and the Union agreed to submit respondent's grievance to a special adjustment board, Public Law Board No. 855, which they had established under Section 3 Second of the Railway Labor Act (*ibid.*). Respondent was informed by the Union that a hearing was to be held in his case before the special adjustment board (Pet. App. A15-A16). The Union represented respondent at the hearing (Pet. App. A31). The board subsequently sustained respondent's discharge.

Respondent sought review of the board's decision in the United States District Court for the Northern District of Ohio. The district court held that the requirement in Section 3 First (j) that the Adjustment Board give "due notice of all hearings to the employee" also applied to special adjustment boards established under Section 3 Second, and it concluded that the board had failed to give respondent "due notice" (Pet. App. A29-A36). The court therefore set aside the board's decision and remanded the case to the board for reconsideration (Pet. App. A36-A37).[2]

On remand, another hearing was held before the special adjustment board, at which respondent was represented by counsel (Pet. App. A22). Following the hearing, the board reduced respondent's discharge to a 365-day disciplinary lay-off, reinstated respondent in his position with full seniority and other rights, and granted respondent back pay for the period from the expiration of the lay-off to his reinstatement (*ibid.*).

Petitioner refused to comply with the award, arguing that the board's first decision had been correct and that the district court's remand had been improper. Respondent returned to the district court, seeking enforcement of the award. The court reviewed new evidence submitted by petitioner on the question whether respondent had received adequate notice of the board's first hearing and reaffirmed its prior decision that notice had not been adequate (Pet.

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[2]Because the district court neither enforced, nor denied enforcement of, the board's order, but remanded the matter to the board for further proceedings (Pet. App. A36-A37), its order was not appealable under 28 U.S.C. 1291. *United Transportation Union* v. *Illinois Central R. Co.*, 433 F. 2d 566 (C.A. 7), certiorari denied, 402 U.S. 915; *Transportation-Communication Division, Brotherhood of Railway, Airline and Steamship Clerks* v. *St. Louis-S.F. Ry. Co.*, 419 F. 2d 933 (C.A. 8), certiorari denied, 400 U.S. 818. See Section 3 First (q).

App. A21-A28). Accordingly, the court ordered petitioner to comply with the board's decision on remand (Pet. App. A29).

On appeal, petitioner argued, *inter alia*, that the notice requirement of Section 3 First (j) does not apply to special adjustment board proceedings held pursuant to Section 3 Second and that, in any event, the notice to respondent had been sufficient (Pet. App. A7). The court of appeals, in a 2-1 decision, rejected these arguments. With respect to the requirement of notice, the majority stated (Pet. App. A11):

> It is clear that special adjustment boards have jurisdiction coextensive with that of the [National Railroad Adjustment Board]. [Petitioner] has advanced no good reason why the statutory procedural rights afforded to employees whose claims are heard by special adjustment boards should be less than those enjoyed by employees whose claims are resolved by the NRAB. We therefore conclude that Section [3] First (j) applies to proceedings before special adjustment boards.

With respect to the sufficiency of notice, the majority acknowledged that since respondent had authorized the Union to represent him, only actual notice from the Union, not formal notice from the board, was required (Pet. App. A13-A15). But the majority defined "actual notice" as "notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim" (Pet. App. A14). Although respondent had received advance notice of the hearing, the majority concluded that the notice was not sufficient, reasoning that, since the Union told respondent "that he could not attend the hearing on his claim and that his witnesses

would not be needed" (Pet. App. A16), it could be inferred that respondent "was not allowed to convey information which might have been helpful in presenting his claim" (*ibid.*).

Judge Engel, dissenting, agreed that the notice requirement of Section 3 First (j) applied to special adjustment board proceedings but disagreed with the majority's holding with respect to the sufficiency of notice in this case. Judge Engel stated that, under this Court's decisions in *Burley I* and *Burley II*, *supra*, once an employee has authorized his union to represent him, it is sufficient if the employee has actual knowledge of the proceedings (Pet. App. A17-A19). Judge Engel concluded (Pet. App. A20):

> * * * I am unable to see upon the facts in this case how more formal or direct notice to [respondent] would have affected his course of action. [Respondent] clearly authorized the union to represent him. He conferred with the union and acted on its advice and counsel. The difficulty is not in the notice; it is in the advice which the union gave [respondent] after the notice.

DISCUSSION

We agree with petitioner (see Pet. 2) that the question in this case cannot accurately be stated as whether the special adjustment board complied with a statutory requirement, if any, that it provide notice of all hearings to respondent. Although the opinion of the majority below is couched in terms of "notice," its decision does not appear to turn upon the requirement, or adequacy, of notice in any true sense. Instead, the majority appears to have held that the decision of a special adjustment board is invalid unless the labor organization authorized to represent the employee gave him

a full opportunity to assist in the preparation of his case. That holding is incorrect. An employee's representative may or may not owe a duty to the employee to provide him an opportunity to assist in the preparation of his case. But breach of that putative duty would at most give rise only to a cause of action against the representative; it does not affect the validity of the special adjustment board's arbitral decision.

1. The decision below cannot be rationalized in terms of a statutory requirement of notice.

a. In our view, the requirement of Section 3 First (j) that "the Adjustment Board shall give due notice of all hearings to the employee" does not apply to special adjustment boards convened under Section 3 Second.

The requirement that the Adjustment Board give notice to the employee effectuates the employee's right, if he so chooses, to bring a matter before the Adjustment Board in person or by private counsel. See *Burley I*, *supra*, 325 U.S. at 734-735. But by the terms of the statute, an individual employee has no right to bring a matter before a special adjustment board convened under Section 3 Second. Only the rail carrier or "the representative of any craft or class of employees" (Section 3 Second), *i.e.*, a labor organization (see S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)), is authorized by the statute to bring a matter before a special adjustment board. See *Brotherhood of Locomotive Engineers* v. *Denver & R.G. W. R. Co.*, 411 F. 2d 1115 (C.A. 10). Moreover, a carrier cannot submit to a special adjustment board a dispute involving an employee who chooses not to be represented by his labor organization. *Chicago, R.I. & P. R. Co.* v. *National Mediation Board*, 435 F. 2d 339 (C.A. 7). And Section 3 Second does not authorize the individual employee to participate in the proceedings without representation once the special adjustment board is convened.

Accordingly, Congress did not require special adjustment boards to give notice of hearings to the individual employee; in all cases, notice to the representative would suffice. For that reason, Section 3 Second, which authorizes the establishment of special adjustment boards, imposes no notice requirement upon such boards. And the notice requirement of Section 3 First (j) by its terms applies only to the National Railway Adjustment Board, not to special adjustment boards.

b. But even if the notice requirement of Section 3 First (j) is construed to apply to special adjustment boards, it requires nothing more of such boards than is required of the Adjustment Board in cases in which the employee is represented by his labor organization. The employee's right under Section 3 First (j) to receive notice of hearings before the Adjustment Board is a "statutory right[], which he may exercise independently or authorize the union to exercise in his behalf." *Burley I, supra,* 325 U.S. at 740 n. 39. See *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n. 1. It follows that when the employee designates a labor organization to act as his exclusive representative in a matter before the Adjustment Board, he has authorized the labor organization to receive on his behalf notice of all hearings. Cf. Rule 5(b), Fed. R. Civ. P. The Adjustment Board therefore discharges its duty to provide notice in such cases by giving notice to the representative.[3] Since in cases before special adjustment

[3]This Court has indicated that "due notice," within the meaning of Section 3 First (j), "would require at the least * * * knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." *Burley II, supra,* 327 U.S. at 666 n. 9. But we understand that to mean that even when the employee represents himself, formal notice is not required in view "of the generally informal procedure of the [Adjustment] Board." *Ibid.* We do not read the statute to require the Adjustment Board either to provide actual notice to a represented employee or to ensure that his representative provides him with such notice. However, if the Court's statement endorses a requirement of actual notice even to represented employees, then we agree with the Seventh Circuit that that requirement is satisfied where "the record discloses that [the employee] knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there." *Kotakis* v. *Elgin, J. & E. Ry. Co.,* 520 F. 2d 570, 576. See also *Hunter* v. *Atchison, T. & S.F. Ry. Co.,* 188 F. 2d 294, 301 (C.A. 7).

boards the labor organization always acts as the employee's exclusive representative (see pp. 2-3, *supra*), such a board satisfies any statutory notice requirement by notifying the labor organization.

c. Respondent "authorized the [Union] to handle his grievance * * * before the special adjustment board" (Pet. App. A14). In particular, he granted the Union "authority to receive notice of hearings" (*id.* at n. 14).[4] The special adjustment board duly notified the Union that a hearing would be held (Pet. App. A31). Moreover, respondent not only "knew his grievance had been submitted" (see note 3, *supra*), he also "knew there was going to be a hearing" (Pet. App. A16). In these circumstances, any notice requirement imposed on the special adjustment board by the Act was amply satisfied.

2. The implicit basis for the decision below appears to be a belief that the underlying purpose of a statutory notice requirement—to facilitate adequate preparation for and representation at the hearing—had gone at least partially unfulfilled in this case, notwithstanding that the Union and respondent had received notice. In ruling that the initial decision of the special adjustment board was invalid, the court of appeals reasoned that since the Union had informed

[4]Respondent could have withdrawn this authorization by serving "reasonable written notice" (*ibid.*) on the Union, but he did not do so.

respondent "that he could not attend the hearing on his claim and that his witnesses would not be needed" (Pet. App. A16), respondent thereby "was not allowed [by the Union] to convey information which might have been helpful in presenting his claim" (*ibid.*). In practical effect, the court sustained the reversal of the special adjustment board's initial decision on the ground that, in the majority's judgment, the Union had not adequately represented respondent in connection with the hearing.

This is an impermissible basis for decision under the Railway Labor Act. If an employee is dissatisfied with the way his claim was presented to a special adjustment board and believes that his representation was faulty or inadequate, he may attempt to recover damages from the representative. Cf. *Czosek* v. *O'Mara, supra.* But the statute does not allow a reviewing court to reverse a decision of a special adjustment board on the ground that the employee had been poorly represented. Reversal of a special adjustment board's decision is permitted only "for failure of the [board] to comply with the requirements of [the Act], for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board]." Section 3 First (p), (q) of the Act.[5]

By couching its decision in terms of "notice," the court of appeals rested upon an alleged "failure of the [board] to comply with the requirements of [the Act]." But nothing in the Act requires the special adjustment board to ensure that the employee's representative will give him a full

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[5]We agree with the holding below that decisions of special adjustment boards are subject to judicial review under Section 3 First (p) and (q). See Pet. App. A7-A9.

opportunity to assist in the preparation of his case. There was no failure on the part of the special adjustment board to comply with the Act.

Under the decision below, however, an *ex post facto* allegation of inadequate representation may be cast, at least in many foreseeable situations, as a challenge to the adequacy of notice. This result is unfortunate. Neither the special adjustment board nor the opposing rail carrier can be expected, or would be able, to police the adequacy of the employee's representation. Certainly the carrier cannot fairly be asked to challenge the adequacy of the employee's representation before the board. Moreover, in a case such as this, where the perceived inadequacy appears to be that the representative discouraged the employee from developing or presenting favorable evidence, there would be little or no reason for either the board or the carrier to suspect the inadequacy of representation. Knowledge of the matter would lie exclusively with the employee and his representative.

In these circumstances, it could be anticipated that a challenge to the adequacy of representation, if permitted to be made in the guise of challenge to the adequacy of notice, would be raised by the employee only after the special adjustment board had entered a decision adverse to him. For the courts to entertain such challenges would weaken the arbitral process under the Act by undermining the finality of awards: each award would be subject to attack on the basis of facts known only to the employee and his representative, such as, in this case, the substance of the employee's discussions with his union. In other words, to permit a decision of a special adjustment board to be overturned in fact on the basis of *ex post facto* allegations relating to the adequacy of representation would be improperly to permit "an employee [to] stand by with knowledge or notice of what is going on with reference to his

claim, * * * allow matters to be thrashed out to a conclusion * * *, and then come in for the first time to assert his individual rights." *Burley II, supra*, 327 U.S. at 666-667.[6]

3. The decision below warrants review by this Court. For the reasons just described, the holding of the majority threatens the integrity of the arbitral process under the Railway Labor Act. It calls into question a large number of past decisions by special adjustment boards.[7] In view of the fact that the liberal venue provisions of the Act would allow a disproportionate number of suits for review to be brought in the Sixth Circuit,[8] this Court should not await the development of a conflict before resolving the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JUNE 1977.

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[6]If the employee believes that his representation before a special adjustment board convened under Section 3 Second is inadequate, his proper recourse is to withdraw his authorization while the matter is still pending before the board (see note 4, *supra*) and institute a proceeding in the Adjustment Board under Section 3 First, where he would be able to appear himself or by private counsel (see p. 2, *supra*). The alternative of such a proceeding before the Adjustment Board, and the narrowness of the judicial review provisions of the Act, distinguish this case from *Hines* v. *Anchor Motor Freight*, 424 U.S. 554.

[7]For example, during the fiscal year ending June 30, 1975, special adjustment boards decided approximately 6,500 cases. National Mediation Board, *Forty-first Annual Report* 44-45 (1975).

[8]An employee may bring an action to review an adverse decision of a special adjustment board in any judicial district "through which the carrier operates." Section 3 First (p).

*The Solicitor General is disqualified in this case.

MOTION FILED

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IN THE

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No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY, *Petitioner,*

v.

L. F. COLE, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Railway Labor Conference respectfully moves for leave to file the attached brief *amicus curiae*. Requests for consent by the parties to the filing of the brief were granted by petitioner but refused by respondent.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees, and in regard to other labor-management relations problems that are of concern to the railroads generally. As is set forth more fully in the attached brief, the decision

by the court below interprets Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j)) in a manner which threatens to undermine the finality of arbitration awards disposing of the claims and grievances of railroads employees, and which we believe to be contrary to the Railway Labor Act and to prior decisions by this Court and by other courts of appeals. That decision, therefore, is of great importance to the Conference and to each of its member railroads.

The purpose of the attached *amicus* brief is to explain the importance of the decision below to the railroad industry generally and to set forth additional or fuller reasons, as compared to the petition, as to why the decision below is erroneous and should be reviewed by this Court. Hence, the attached brief is believed to be necessary to an adequate presentation of the position of the National Railway Labor Conference and its member railroads and to be relevant to the disposition by this Court of the petition for writ of certiorari.

Respectfully submitted,

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Railway Labor Conference as *amicus curiae* submits this brief in support of the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Cole* v. *Erie Lackawanna Railway Company,* 541 F.2d 528 (1976).

STATEMENT OF THE CASE AND OF THE INTEREST OF AMICUS CURIAE

1. The Railway Labor Act.

The Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*) governs labor-management relations in the railroad and airline industries.[1] The Act was amended in 1934 (48 Stat. 1189) to provide, in § 3 First, a procedure for the adjustment of "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . . ." 45 U.S.C. § 153 First (i). Such claims and grievances "shall be handled in the usual manner up to and including the chief operating officers of the carrier designated to handle such disputes," but if not adjusted through such recourse to the carrier's claims-and-grievances procedure "the disputes may be referred by petition of the parties or by either party to the appropriate division of" the National Railroad Adjustment Board (the "NRAB"). *Ibid.*

Each of the four divisions of the NRAB is comprised of an equal number of members selected and compensated by the rail carriers and by the national unions representing their employees. 45 U.S.C. § 153 First (a)-(h). In the event of a deadlock or if for some other reasons a majority of those members cannot agree upon an award disposing of a dispute, a "neutral person" is selected (and compensated) by the National Mediation Board (the "NMB") to "sit with

[1] Air carriers are excepted from the application of § 3 of the Act. 45 U.S.C. § 181. Disputes over claims and grievances in that industry are governed by § 204. 45 U.S.C. § 184.

the division as a member thereof and make an award." 45 U.S.C. § 153 First (l). All awards "shall be final and binding upon both parties to the dispute," 45 U.S.C. § 153 First (m), subject only to judicial review "for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order," 45 U.S.C. § 153 First (p) and (q).[2]

Section 3 Second of the Act, as enacted in 1934, authorizes the rail carriers and their employees, "acting through their representatives," to establish "system, group, or regional boards of adjustment for adjusting and deciding disputes of the character specified in" § 3 First in lieu of the NRAB. 45 U.S.C. § 153 Second (first paragraph). Establishment of special boards of adjustment pursuant to that paragraph is dependent upon voluntary agreement between the carriers and unions, but in 1966 the Congress amended § 3 Second (80 Stat. 208) to add a second paragraph under which "the establishment of a special board of adjustment to resolve disputes otherwise referrable to the" NRAB is mandatory if either a carrier or "the representative of any craft or class of employees" requests the other to join in establishing such a board. The carrier and the union each designates and compensates a member of the board and a "neutral member" is designated and compensated by the NMB to decide disputes as to which the carrier and union mem-

[2] The provisions for judicial review are quoted as revised by a 1966 amendment (80 Stat. 208). For the situation in regard to judicial review prior to that amendment, see, *e.g.*, *Gunther* v. *San Diego & A.E. R. Co.*, 382 U.S. 257 (1965).

bers fail to agree.[3] The awards of such boards "shall be final and binding upon both parties to the dispute," and are subject to judicial review "in the same manner and subject to the same provisions that apply" to review of awards by the NRAB.[4] 45 U.S.C. § 153 Second (second paragraph).

While the NRAB continues to function, most disputes that go to arbitration are now handled by boards established pursuant to § 3 Second. In the fiscal year ended June 30, 1975, for example, the NRAB disposed of 1033 cases, special boards of adjustment established pursuant to the first paragraph of § 3 Second disposed of 1071 cases, and special boards of adjustment established pursuant to the second paragraph of § 3 Second (which are identified by the NMB as "PL" or "Public Law" boards) disposed of 5404 cases.[5]

Section 3 First of the Act also provides, among other things, that "[p]arties may be heard, either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to

[3] If the carrier and union are unable to agree upon "the establishment and jurisdiction of the board," the NMB also appoints a neutral to determine "such matters." Neutral members may be selected by the carrier and union by agreement, but they usually are designated by the NMB.

[4] While the 1966 amendment in terms provides for such review only in proceedings for the "enforcement" of awards, the lower courts (including the court below in this case) generally have held (upon the basis of legislative history) that review can be had also in proceedings to set aside an award. See, *e.g.*, *United Transp. Union* v. *Indiana H.B.R. Co.*, 540 F.2d 861 (7th Cir., 1976).

[5] Forty-first Annual Report of the National Mediation Board (1975), at 43-45.

the employee or employees and the carrier or carriers involved in any disputes submitted to them." 45 U.S.C. §153 First (j). Those provisions of § 3 First (j) afforded the principal basis for this Court's decision, in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945), to the effect that an NRAB "award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by § 3 First (j)" (*id.*, at 738). Having concluded that the union representing the claimants' craft or class was not authorized as a matter of law by the Railway Act "to settle the claims accrued for the past or to represent the claimants exclusively in proceedings before the Board," and thus that "for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential" (*id.*, at 741), this Court affirmed a decision remanding the case to determine, among other things, whether the claimants had in fact "authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the" proceedings before the NRAB (*id.*, at 748-749).

In so holding this Court recognized that a NRAB award would be binding on an employee claimant, where his union "appeared and purported to act for him," if "in some legally sufficient way he authorized it to act in his behalf" (*id.*, at 738), and the Court explained in a footnote to that statement that "[a]uthority might be conferred in whatever ways would be sufficient according to generally accepted or 'common law' rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to

settle such grievances as they might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements" (*id.*, n. 38, at 738-739). In short, § 3 First (j) confers "statutory rights" which an employee "may exercise independently or authorize the union to exercise in his behalf" (*id.*, n. 39, at 740).

A petition for rehearing resulted in a further opinion by the Court. *Elgin, J & E. R. Co.* v. *Burley*, 327 U.S. 661 (1946). While stating that it adhered to its prior decision, the Court further emphasized the burden upon an employee to establish that the union was not authorized to represent him in the handling of his claim or grievance (*id.*, at 664-665); the many ways in which the union could be given such authority—even going beyond common-law means to include "usage and custom"—(*id.*, at 663) including, "so far as union members are concerned . . . by appropriate provisions in [the union's] by laws, constitution or other governing regulations" (*id.*, n. 2, at 663-664); and that—even in the absence of such authorization—an employee "having knowledge or notice that . . . proceedings are pending before the" NRAB in regard to his claim could not "stand by" until a decision was reached "and then come in for the first time to assert his individual rights" (*id.* at 666-667).[6]

[6] The carrier's petition for rehearing was supported *amicus curiae* "by various labor organizations and by the office of the solicitor general" (id., n. 1, at 661) who demonstrated, in the words of Mr. Justice Frankfurter, that the prior "decision created havoc in the railroad world" (*id.*, at 674). While Justice Frankfurter (joined by Chief Justice Stone and Mr. Justice Burton) concluded that "the Court's interpretation of its original opinion . . .

Mr. Justice Frankfurter subsequently had occasion to note that the railroad unions "were quick to secure amendment to their constitution or statutes in order to avoid the decision of this Court in" *Burley. Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 458 (1955). Thus, as the record in this case discloses (App. 55-56),[7] the Constitution of the United Transportation Union (the "UTU"), to which respondent Cole belonged, provides that:

> "Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints, or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of hearings or to

'adheres' to it by extracting from it almost all of its vitality" and "erects a series of hurdles which will be, and we assume were intended to be, almost impossible for an employee to clear," he continued to dissent to the decision "since litigation is authorized, and hope springs eternal in the litigant's breast" so that the opinion on rehearing did not completely cure the "mischief" which he perceived in the original opinion (*id.*, at 668). This case provides some justification for the concern thus expressed. The Second Circuit has noted that several developments in "federal labor law" since "the *Burley* decisions were announced" have "considerably diminished" the "urgency" of interpreting the Act as "giving the individual employee considerable leeway in pursuing his own grievance . . . ." *Pyzynski* v. *New York Central Railroad Company*, 421 F.2d 854, 861-862 (2d Cir., 1970).

[7] Citations herein to "App." are to the Appendix filed by the parties with the court below.

> waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in accordance with the provisions of this Constitution, except where the member involved serves reasonable written notice on the United Transportation Union to the contrary.

And, in fact, the overwhelming bulk of the cases before the NRAB have continued to be submitted by union representatives of employees rather than by individual employees.[8]

Section 3 Second does not in terms contain an equivalent to § 3 First (j) or adopt that provision by reference. Rather, the 1966 amendment to § 3 Second provides that "the members" of a board created thereunder "shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board," and further provides for the establishment of such adjustment boards only upon request of (or by a carrier to) a union "representative." See p. 3, *supra*. And, the "different wording found in [§ 3 Second] is not accidental. By requiring a union to represent anyone seeking a special board, the 1966 amendment . . . sought to prevent frivolous claims from being tendered by individual employees to multitudinous special boards." *Antonioli* v. *Lehigh Coal and Navigation Company,* 47 F.R.D. 198, 201 (E.D. Pa., 1969). Hence, the "Congress did not pro-

[8] For example, of the 917 new cases filed with the NRAB in the fiscal year ended June 30, 1975, 865 were submitted by unions and only 52 by individual employees. Forty-first Annual Report of the National Mediation Board (1975), at 49-56.

vide for a Special Board where . . . the dispute is between an individual employee and a carrier" and "neither a carrier nor an individual employee can secure a Special Board where the employee's grievance is not being processed by a union," which "comports with the Congressional intent to avoid a proliferation of special boards where claims have not been previously screened by the union or railroad. S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 2." *Chicago, R. I. & P. R. Co.* v. *National Mediation Board,* 435 F.2d 339, 341, 342 (7th Cir., 1970).[9]

Hence, insofar as we are aware, public law boards and other special boards of adjustment established pursuant to § 3 Second heretofore have regarded the parties to disputes before such boards as being the unions and carriers involved, and have notified those parties of the hearings, as was done by Public Law Board No. 855 in this case.

[9] See, also, *Brotherhood of Locomotive Eng.*, v. *Denver & R.G.W. R. Co.*, 411 F.2d 1115, 1118 (10th Cir., 1969); *cf.*, *Slagley* v. *Illinois Central Railroad Company*, 397 F.2d 546, 551 (7th Cir., 1968). A union witness supporting the legislation testified that one reason for retaining the NRAB was to provide an arbitration forum for individual employees who chose to personally prosecute their claims. *Hearings on Railway Labor Act Amendments Relating to NRAB before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess., (1965), at 230. And, in the House debates, Representative Williams (the sponsor of the legislation) described in "some detail a hypothetical case of the type involved in this legislation" in terms which showed union handling at all stages (112 Cong. Rec. 2750-2751). He further stated that "one virtue of the special board procedure" is that "the carrier officers assigned to handle the board and the organization officer are more familiar with their own contract than if it were being handled by strangers to the contract" (*id.*, at 2751).

2. The Proceedings Below.

Mr. Cole was discharged in April of 1971 by the Erie Lackawanna for violating company rules. He had been a member of the UTU (or a predecessor union) since his employment by the railroad (App. 39), and he contacted local officials of that union about his grievance (App. 40-42). He was advised that the union would take the matter up with management and would handle it further to a board if necessary (App. 42). Mr. Cole was familiar (App. 47-48) with the provision in his union's constitution under which, unless notified by the employee to the contrary, the union is given "complete authority" to handle a member's claim or grievance, including "authority to receive notice of hearings" (see p. 7, *supra*). He did not notify the union to the contrary as "I thought that's what I was paying my union dues for, to have representation," and he knew that the union officials "were representing" him (App. 47).

The Erie Lackawanna and the UTU entered into an agreement pursuant to § 3 Second of the Act establishing Public Law Board No. 855 (comprised of a carrier member, a union member and a neutral member) to arbitrate certain claims submitted by the union which they had been unable to settle by agreement (App. 6-10), including the claim on behalf of Mr. Cole (App. 14, 20). Mr. Cole had talked with union officials many times about his claim throughout the period in which it was pending (App. 42-43), and he was advised by them about a week in advance of the date of the Board's hearing of the claim (App. 46). In his deposition taken after this litigation was commenced, Mr. Cole referred to that Board on occasion as the "Labor Relations Board" (App. 42, 45, 49), but he was aware it

would have three members (App. 46, 50)—"the union and the management and the judge" (App. 43).

Mr. Cole informed the union officials that he wanted to attend the hearing and bring witnesses, but was advised that his was the union's "best case" of the four to be heard at the time (App. 45, 46), that he needn't bring any witnesses, and that he couldn't attend as the hearing would be a closed session (App. 43-44, 45-46). There is no evidence that Mr. Cole advised Public Law Board No. 855, or any member thereof, that he wanted to attend the hearing or to bring witnesses, or that he took any action prior to the Board's award to obtain permission from the Board to do so apart from the aforesaid discussions with union officials. He provided the union officials with information and with the names of the witnesses he had in mind (App. 52), and there is no showing in the record that the union did not present any material evidence to the Board in written form (which is the usual procedure) or as to what additional evidence, if any, Mr. Cole and the putative witnesses would have presented to the Board if they had appeared at the hearing.

On June 1, 1972, Board No. 855 issued an award (App. 4-5), which found that Mr. Cole "without authorization of the Carrier, delegated his duty and responsibility for flag protection to a person not qualified to perform flag protection work and who was not an employee of the carrier," so that his dismissal was properly "based upon violation of rules as charged and was for just cause," and denied his claim for reinstatement with back pay. The award also recited, among other things, that the union and the carrier were the parties to the dispute and that said parties "were given due notice of hearing thereon."

Mr. Cole then instituted this litigation, through his own attorneys, to set aside that award (App. 3-4). The District Court granted his motion for summary judgment and set aside the award on the ground that the Board "failed to comply with the requirements" of § 3 First (j) of the Act in that it did not notify Mr. Cole personally of its hearing and thereby deprived him "of the right to appear either in person or through counsel as the statute permits." *Cole* v. *Railroad Adjustment Board,* 89 LRRM 2496, 2499 (N.D. Ohio, 1974).[10] The District Court remanded the case to Public Law Board No. 855 "for reconsideration upon due notice to petitioner," and directed that he "be given the opportunity to be heard through counsel and to present witnesses on his behalf." *Ibid.*[11]

On remand, the Board held a further hearing at which Mr. Cole appeared with counsel and testified (App. 34), and issued a new award (App. 32-36). The Board again found that Mr. Cole "was derelict in his duty when he was careless of the safety of other persons by delegating his responsibility as a flagman to a person who was not an employee or flagman of the Carrier" and also had violated a rule which "required

[10] The District Court also concluded that Cole "was not represented before the Board," apparently because it was under the impression that he was "no longer a member" of the UTU, and "could not understand how petitioner could have been represented by a union of which he no longer was a member" (89 LRRM, at 2499).

[11] Such an order has been held to be interlocutory in nature, and thus not immediately appealable. *Transportation-Com. Div.*. v. *St. Louis-San Francisco Ry Co.*, 419 F.2d 933 (8th Cir., 1969), cert. den., 400 U.S. 818 (1970). Review on appeal is had, as in this case, after a final decision is entered by the district court following the proceedings of the arbitration board on remand.

him to have with him appropriate torpedoes," so that the Erie Lackawanna "had just cause to discipline" him (App. 35). But without further explanation, the Board also concluded that a "discharge was too harsh and severe under the circumstances," and that it should be "converted to a disciplinary lay-off of 365 calendar days" (*ibid.*). That period had long since expired, and the Board ordered that Mr. Cole "be restored to duty with full vacation rights, full seniority and all privileges to which he is entitled;" and that he be awarded back pay for all time lost between the end of the disciplinary period and his reinstatement without "deduction for outside earnings" during that period (*ibid.*).

An Amended Petition in this litigation by Mr. Cole to enforce the Board's second award was granted by the District Court. *Cole* v. *Erie Lackawanna Railway,* 396 F. Supp. 65 (N.D. Ohio, 1975), and the Erie Lackawanna's appeal after that final order led to the decision by the Sixth Circuit which is the subject of the petition for writ of certiorari. *Cole* v. *Erie Lackawanna Railway Company,* 541 F.2d 528 (6th Cir., 1976). In affirming the decisions of the District Court, the court below held, among other things, that "the notice requirements" of § 3 First (j) are applicable to adjustment boards established pursuant to § 3 Second of the Act as well as to the NRAB (*id.,* at 532-533); that under § 3 First (j) an employee must be given "[a]ctual notice . . . of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim" (*id.,* at 534) even though, as occurred in this case, the employee "authorized" the

union "to handle his grievance" and in fact was "represented" by the union (*id.*, at 534-535); and that, while Mr. Cole "knew in advance that the Board would be conducting a hearing on his claim," he "did not understand the workings of the Board" as is demonstrated by "his reference to the Board as the 'Labor Relations Board' and his requests to be present and present witnesses" (*id.*, at 535).

From this and a conclusion that the "union [which is not a party to the litigation] cannot contend that Appellee's right to effective presentation of his claim to the Board, as guaranteed by Section [3 First (j)] has been preserved when he was prevented from conveying potentially helpful information to the Board via union officials," the majority of the Court of Appeals concluded that Mr. Cole "did not receive notice sufficient to obviate the provision to him of formal notice as required by" § 3 First (j) (*ibid.*). Judge Engel dissented (*id.*, at 536-537).

3. The Interest of Amicus Curiae.

The National Railway Labor Conference represents almost all of the nation's Class I railroads in national collective bargaining with the unions representing their employees, and in regard to other labor-management relations problems that are of concern to the railroads generally. The decision below is a matter of great concern to the Conference and to its member railroads because, if not reviewed and reversed by this Court, it threatens to upset the heretofore settled accommodation of this Court's *Burley* decision; to extend § 3 First (j) of the Act and that decision (however construed) to the proceedings of public law boards and other special boards of adjustment established

pursuant to § 3 Second; and to undermine the finality of arbitration awards by allowing an employee to obtain a judgment setting aside such an award and to obtain a second opportunity for a favorable award without any fault on the part of the adjustment board or the carrier involved and by reason solely of some lack of understanding on the part of the employee attributable solely to the actions or advice of the union which he authorized to represent him.

If the decision below should stand, the carriers will be unable to rely with confidence upon either an agreement with a union settling a claim or grievance submitted by the union on behalf of an employee, or upon an award by the NRAB or a § 3 Second adjustment board disposing of the dispute, even though the union concededly has been authorized to represent the employee. There always would be the possibility that such settlement agreement or award could be upset because the employee, unbeknownst to the carrier or the adjustment board, had been advised by union officials in a manner subsequently deemed by a court to be inadequate or improper. In our view, this would seriously undermine the procedures which the Congress in the Railway Labor Act has provided for the disposition of claims and grievances.

REASONS FOR GRANTING THE WRIT

We believe that it is apparent from the foregoing recital that the decision below not only conflicts with the decision of this Court in the *Burley* case and is otherwise erroneous, but also reaches a result that has large importance to the proper working of the Railway Labor Act in the handling and disposition of disputes over grievances and the application and inter-

pretation of collective bargaining agreements. And, as we shall show, the decision below also constitutes an impermissible evasion of the limitations which this Court has placed upon a union's duty of fair representation.

A violation of § 3 First (j) of the Act is essential to the validity of the decision setting aside the first award by Public Law Board No. 855, since the Act expressly permits that to be done only if an adjustment board fails to "comply with the requirements of" the Act, or to confine itself to "matters within the scope of" the board's "jurisdiction," or "for fraud or corruption by a member" of the board. See pp. 3-4, *supra*. There is no claim or holding in this case that Board No. 855 exceeded its jurisdiction or of fraud or corruption on the part of a member, and the only claim or holding in regard to the "requirements of the Act" is based upon the alleged failure to comply with § 3 First (j).

We believe that the holding below that § 3 First (j) is applicable to public law boards and other special boards of adjustment established pursuant to § 3 Second of the Act is highly questionable, to say the least, and in itself is an issue worthy of review by this Court. As we have indicated, that holding is contrary to the language of § 3 Second and of the legislative history of the 1966 amendment thereto, and to principles expressed by other lower courts. See pp. 8-9, *supra*. But however that may be, § 3 First (j) surely has been complied with in this case.

Section 3 First (j) provides that the NRAB "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dis-

putes submitted to" the Board. But there is nothing in § 3 First (j) which say that notice to an "employee or employees" cannot be effectuated through notice to his or their authorized representative in the adjustment board proceedings, just as notice to or service upon a party to a law suit commonly is effectuated through notice to or service upon his attorney. Indeed, the general common-law rule is that notice to an agent constitutes notice to his principal regardless of whether the agent communicates it to the principal.[12]

In any event, while this Court held in *Burley* that the Railway Labor Act does not in itself authorize the collective bargaining agent of a craft or class of employees to represent them in NRAB proceedings, so that "for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential" (see p. 5, *supra*), this Court also made clear that such authority could be given to the union in a variety of ways (see pp. 5-6, *supra*). As this Court subsequently stated (citing and quoting from *Burley*), the "individual employee's rights" under § 3 First (j) "to participate in the processing of his grievances 'are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.' " *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n. 1 (1970).

Moreover, this Court also explained in *Burley,* both initially and in its opinion on rehearing, that one of the ways in which an employee could authorize his union to act in his behalf was through his membership when the union's constitution or by-laws provided for

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[12] See *e.g.*, Restatement Agency 2d, § 268; 3 Am. Jur. 2d, Agency § 273; 3 C.J.S., Agency, § 432.

such representation (see pp. 5-6, *supra.*). See also, *e.g., Simberlund* v. *Long Island Rail Road Company,* 421 F.2d 1219, 1225 (2d Cir., 1970), holding that such a provision in a union's constitution "was sufficient to vest authority in the" union to "act in . . . behalf" of a member in handling and settling his claim or grievance. And, as we have noted (pp. 7-8, *supra.*), the union generally have adopted such provisions in reaction to and accomodation of the *Burley* decision.

Thus, in this case, the constitution of Mr. Cole's union—the UTU—contained a provision giving it "complete authority" to handle his claims and grievances, specifically including "authority to receive notice of hearings" and to "appear for, represent, and act for" him "before any person, board, or other tribunal in connection" therewith. See pp. 7-8, *supra.* While Mr. Cole could have revoked that authorization by notice to the union, as he knew, he did not do so because he wanted representation by the union "as that's what I was paying my union dues for. . . ." See p. 10, *supra.*

But for the decision below, therefore, it would seem entirely clear that when Public Law Board No 855 notified the UTU of its hearing on the claim submitted by the UTU on behalf of Mr. Cole, the Board in effect gave such notice to Mr. Cole. There is no requirement in § 3 First (j) or elsewhere in the Act, or in reason, imposing upon an *adjustment board* an obligation to assure "actual" notice to a claimant whose authorized representative formally has been notified.[13] If there

[13] The court below relied upon three decisions by the Seventh Circuit for its view that actual notice to the employee claimant also is required. See 541 F.2d, at 534. One of those cases, the *Hunter* case, held to the contrary that § 3 First (j) would be satisfied if the employees involved either had "actual notice of the hearings, *or* authorized the Santa Fe" (which was formally notified and which purported to represent their interests) to represent them in such proceedings. 188 F.2d, at 301 (emphasis added). The *Whitehouse* case involved a situation in which one union on behalf of member employees claimed the right to perform work being performed by members of a second union. This Court subsequently held that the conflicting claims of the two unions on behalf of their members should be resolved in one adjustment board proceedings by giving notice pursuant to § 3 First (j) to the second union, without in any way suggesting that either formal or actual notice also had to be given to the interested members of that union. *Transportation Union* v. *U.P.R. Co.,* 385 U.S. 157 (1966). And, in the *Kotakis* case, the Seventh Circuit held that notice to the employee's union was sufficient to comply with § 3 First (j) since the employee had authorized the union to represent him and knew that it was representing him in a NRAB proceeding, 520 F.2d, at 576. In so holding that Court rejected a contention that the board also was required to notify the employee personally of its hearings (*ibid.*), which holding also is contrary to the decision below in this case.

is any obligation to afford "actual" notice in those circumstances. it is the obligation of the union or other authorized agent to its principle. But under § 3 First (p) and (q) of the Act, an adjustment board's award can be set aside for "failure of the division [*i.e.,* of the board] to comply with the requirements of this Act," not for some failure of a union or other authorized representative.

An employee's actual notice or knowledge may be important if he has not authorized a union to represent him, and has not himself been given formal notice of the hearings. As this Court pointed out in *Burley* on rehearing, an employee cannot stand by with notice or knowledge that the union is purporting to represent him and then, after an adverse decision, "come in for the first time to assert his individual rights." See p. 6, *supra.* See also, *e.g., National Air., Inc.* v. *International Ass'n of Mach., Etc,* 478 F.2d 1062, 1066 (5th

Cir., 1973); *Pyzynski* v. *New York Central Railroad Company,* 421 F.2d 854, 861 (2d Cir., 1970). Hence, even if Mr. Cole had not authorized the UTU to represent him, this action to set aside the award should have been denied because he stood by until after an adverse award was rendered by Public Law Board No. 855 without ever attempting to assert his individual rights to the Board and with knowledge that the UTU was proceeding with his claim before the Board, including a week's advance notice from the union of the date of the hearings. See pp. 10-11, *supra.*

We doubt if Mr. Cole was so lacking in understanding of "the workings of the Board" as the court below believed. His reference at a later date to the Board as a "Labor Relations Board" hardly is a heinous mistake, and Mr. Cole was aware of the composition of the Board. See pp. 10-11, *supra.* In any event he understandably relied on his union to represent him "as that is what I was paying my union dues for," and there is no contention that the union did not understand "the workings of the Board." So, too, the court below did not hold that the union was mistaken in informing Mr. Cole that the Board's meeting would be closed so that he could not attend and that there was no need for his witnesses. And, the record does not support the assertion of the court below that Mr. Cole "was not allowed to convey information which might have been helpful to his claim" as he conveyed information and gave the names of his putative witnesses to his union representative. See p. 11, *supra.*

In any event, the foregoing discussion points up the fact that if any mistakes or wrongdoing occurred in connection with the arbitration proceeding, it was on the part of Mr. Cole's union as his representative.

While that is not grounds for setting aside an arbitration award under § 3 First (p) and (q), it may be grounds for a suit based upon an alleged violation of the duty of fair representation. That duty extends to a union's representation of employees in the handling of their claims and grievances. *Conley* v. *Gibson,* 355 U.S. 41, 46-47 (1957); *Glover* v. *St. Louis-S.F. R. Co.,* 393 U.S. 324 (1969). However, this Court has imposed strict limits upon the duty of fair representation so as to avoid undue restrictions upon a union's freedom to represent its members in the manner it deems appropriate under the circumstances.

In general, therefore, to establish a violation of the duty of fair representation, an employee "must have proved 'arbitrary or bad-faith conduct on the part of the Union.' *Vaca* v. *Sipes,* [386 U.S. 171], at 193 [1967]. There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' *Humphrey* v. *Moore,* [375 U.S. 335], at 348 [1964]." *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299 (1971). More particularly for present purposes, a union's refusal even to submit a grievance to arbitration cannot constitute a breach of the duty of fair representation, in the absence of "proved arbitrary or bad faith conduct on the part of the Union in processing [the] grievance," since "the union's incentive to settle such grievances short of arbitration would be seriously reduced" if a breach of the duty of fair representation could result merely "because a judge or jury later found the grievance meritorious . . . ." *Vaca* v *Sipes, supra,* at 192-193. So, too, "[j]ust as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous dis-

putes," and the fact that the union gave advice or assurances to an employee as to the handling of his grievance that "were not well founded" did not violate the duty if there was "insufficient proof of dishonesty or intentional misleading on the part of the union." *Humphrey* v. *Moore, supra,* at 348-349.

There is no showing or even a clear holding by the court below that the UTU was negligent or mistaken in its handling of Mr Cole's grievance, much less that it acted dishonestly or in bad faith. But even if the UTU "may have acted negligently or exercised poor judgment," that "is not enough to support a claim of unfair representation." *Bazarte* v. *United Transportation Union,* 429 F.2d 868, 872 (3d Cir., 1970). Moreover, even where a union has violated that duty, there is no "possible sense . . . in a rule which would permit a court . . . to fashion a remedy only with respect to the employer," as that would be "slight deterrence, indeed, to future union misconduct . . . ." *Vaca* v. *Sipes, supra,* at 187. Yet, the court below has affirmed a decision which penalizes only the employer by setting aside an arbitration award in its favor and allowing the employee a second opportunity in circumstances where there was no fault of any kind on the part of either the adjustment board or the employer, and any fault of the union would not be sufficient to prove a breach of its duty of fair representation.

Indeed, only last Term, this Court emphasized the protections afforded by the limitations imposed upon the duty of fair representation, to the finality of arbitration awards, in holding that an employee could recover from his employer for breach of contract in discharging the employee without good cause (if proven), despite an arbitration award in favor of the employer,

where that award was tainted by the bad faith of the employee's union in handling his grievance. *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976) In rejecting a contention that its holding would "undermine not only the finality rule but the entire collective-bargaining process" (*id.,* at 570), this Court explained that:

> ". . . [T]he burden on employees will remain a substantial one, far too heavy in the opinion of some. To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. As the District Court indicated, this involves more than demonstrating mere errors in judgment. . . . The grievance process cannot be expected to be error free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply."

Id., at 570-571.

The decision below in this case effectively strips an employer under the Railway Labor Act of the protections afforded under the duty of fair representation by the requirement of proof that "the employee's representation by the union has been dishonest, in bad faith or discriminatory. . . ." Without those protections, upon which this Court relied in *Hines* for its contrary conclusion, the decision below will indeed "undermine not only the finality rule, but the entire collective-bargaining process" unless reviewed and cor-

rected by this Court. It will be possible for a court to set aside an award by an adjustment board, despite the severe limitations imposed by the Congress upon the scope of juicial review, for what are at most "mere errors in judgment" or "occasional instances of mistake" on the part of an employee's authorized union representative. We submit that the law is and should be to the contrary. But however that may be, surely the decision below is sufficiently questionable and important to justify review by this Court.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

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Supreme Court of the United States

October Term, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL RAILWAY LABOR CONFERENCE

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Respondent objects to the Motion for Leave to File Brief Amicus Curiae by The National Railway Labor Conference (NRLC) and withheld its consent to the filing of said Brief for the following reasons:

I. RULES OF THIS COURT

A. Rule 42 (3)

Rule 42 (3) of this Court provides in part, as follows:

". . . It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will

not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. . . ."

Respondent submits that "It" refers to a Motion for Leave to File.

B. Contents of the Motion.

There are no facts set out in this Motion. There are no questions of law set out in this Motion that the NRLC alleges have not been or will not adequately be presented by the parties. The NRLC in its Motion mentions Section 3, First (j) of the Railway Labor Act (45 U. S. C., Sec. 153), but does not state that the law concerning this section has not been and will not adequately be presented by the parties. It is submitted that NRLC could not allege that the questions of law surrounding Section 3, First (j) of the Railway Labor Act have not been or will not adequately be presented by the parties since this matter has been thoroughly presented to the lower courts time and time again in the form of memorandums and briefs during the course of this case. For the above reasons, the Motion should be overruled.

C. Length of Motion.

The Motion should be overruled and not be considered because the document filed herein exceeds five printed pages in length, contrary to Rule 42 (3) of this Court. The format of the document, i.e., part of it being a Motion of two pages and part of it being a Brief of twenty-four pages, when the Brief contains items that belong in the Motion, cannot avoid the application of Rule 42 (3). Nor should this Court assume that the Brief attached

to the Motion is incorporated into the Motion, since this also would void the intent of Rule 42 (3). If this procedure is allowed by this Court, there is no reason for the Motion, as the Brief itself is already before the Court. From a reading of the Rule, it appears to Respondent that NRLC should file a Motion not exceeding five printed pages in length covering the matters set out in Rule 42 (3). Then, if the Motion is granted, the Brief should be filed.

II. NATURE OF NRLC'S INTEREST

The NRLC, in fulfillment of a reason for its existence, desires to be an *amicus curiae* in this case primarily to help the Erie, who is probably one of its members. In order to help the Erie, the NRLC desires the opportunity as *amicus curiae* to attack the lower courts' decisions in two elementary basic ways, namely, (1) to change the law, or (2) to change the facts. Also, in its attempt to help the Erie by changing the law, the NRLC has the desire and hope to help all of its member railroads by having this Court further reduce the rights of an employee in cases such as this. This is the nature of the NRLC's interest in this case and it is not sufficient for this Court to grant its Motion to file a Brief *amicus curiae* herein.

III. THE LAW

The NRLC in its Brief attempts to raise questions of law that it believes have not been or will not adequately be presented by the parties. The NRLC devotes the first fourteen (14) pages in its Brief to a discussion of The Railway Labor Act and The Proceedings Below. These historical recitations, by their very nature, reveal

no question of law that has not been and will not adequately be presented by the parties. The Interest of Amicus Curiae, page 14, does not discuss the law. Under Reasons For Granting The Writ, pages 15 through 24, the NRLC merely elaborates and further discusses those questions of law presented by the Petition for Writ of Certiorari. The discussion therein pertaining to the relationship between a union and an employee has nothing to do with the law in the case before this Court.

The law in this case is settled; it does not conflict with applicable decisions of this Court or another court of appeals; it was understood and properly applied by the lower courts; it should be changed by Congress, if any changes are to be made; and it is not an important question of federal law when compared with other cases this Court is asked to review. This case is legally narrow in its concept and does not present difficult, complex and important questions of federal law, that affect the lives of millions of people and relates to the vitality and future course of our nation, which it is the custom of this Court to decide.

On the law, the Motion should be denied.

IV. FACTS AND EVIDENCE

In its Brief the NRLC extensively discusses the evidence and facts in this case and argues that based upon its version and interpretation of the evidence the factual determinations made below were incorrect. This type of argument has no place in an appeal to this Court, and this Court should not grant the Motion so that it may review or weigh the evidence as advocated by the NRLC. In 32 AM. JUR. 2d, *Federal Practice and Procedure*, Section 308, page 784, it is stated: (Footnotes omitted)

"§ 308. Questions of law and fact.

The general principle that appellate review is ordinarily limited to a determination whether there has been error of law, the trial court's decision of questions of fact being taken as conclusive in most circumstances, is applicable to review by the Supreme Court. Thus, on appeal to the Supreme Court, the review is generally confined to matters of law shown by the record. The Court will not pass on the sufficiency of the evidence in the absence of glaring error, nor enter into a consideration of assigned errors below in dealing with matters of fact, but it accepts the verdict of the jury or the findings and conclusions of the court on conflicting facts as conclusive."

Although the NRLC argues and discusses the evidence and facts at great length, it does not set out any facts that have not been and will not adequately be presented by the parties. Neither does the NRLC allege any reasons for it to believe that any facts will not be presented by the parties.

V. SUMMARY

As to the document filed with this Court. If the Brief is incorporated into the Motion, then the Motion exceeds five printed pages in length, contrary to Rule 42 (3). If the Brief is not incorporated into the Motion, then the Motion does not concisely state those matters set out in Rule 42 (3), which rule requires "It shall concisely state . . ." such matters. In either case, the Motion of the NRLC should be denied.

The Motion and Brief of the NRLC does not set forth any facts or questions of law that the NRLC alleges have

not been presented by the parties. Neither does the NRLC give any reasons for believing that any facts or questions of law will not be adequately presented by the parties. All the facts and questions of law in this case have been and will be adequately presented by the parties. See Rule 42 (3). Since this is true, the Motion of the NRLC should be overruled.

CONCLUSION

The Motion for Leave to File Brief Amicus Curiae of The National Railway Labor Conference should be denied and its Brief as Amicus Curiae not considered by this Court. Further the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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